Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

BRIAN J. NEWMARK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari
To the United States Court of Appeals
for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

PETER GOLDBERGER
Counsel of Record
PAMELA A. WILK
50 Rittenhouse Pl.
Ardmore, PA 19003
(610) 649-8200
Attorneys for Petitioner

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QUESTIONS PRESENTED

1. Can a false representation to a third party, not to the alleged victim, satisfy the required proof that the defendant devised a "scheme or artifice to defraud" that victim of money or property under the federal mail or wire fraud laws?

2. In assessing whether the defendant's substantial rights were affected by the court's erroneous jury instruction explaining a "scheme or artifice to defraud," can either the third ("substantial rights") or the fourth ("fairness, integrity or public reputation") prong of the "plain error" test be held unsatisfied on the basis of the court of appeals' subjective conclusion that documentary evidence showing a lack of misrepresentation was "outweighed" by ambiguous circumstances and the doubtful recollections of a witness?

LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties (Brian Newmark and the United States). Mr. Newmark's co-defendant at trial, John Wight, was acquitted on all counts.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIAN J. NEWMARK respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit filed on March 12, 2010.

OPINIONS BELOW

The Third Circuit's non-precedential opinion (per Tashima, J., sitting by designation, with Sloviter & Roth, JJ.) was filed on March 12, 2010. A copy is Appendix A; it is also available at 2010 WL 850200. The United States District Court for the Eastern District of Pennsylvania (Pratter, J.) issued an order and lengthy opinion on April 4, 2008, granting petitioner's post-trial motion for judgment of acquittal on two counts, leaving him convicted only on Count One. Appendix B; United States v. Newmark, 2008 WL 927961. The district court also filed an opinion and order on May 22, 2008, explaining its denial of petitioner's motion to reconsider as to Count One. Appx. C; United States v. Newmark, 2008 WL 2165093 (E.D.Pa.). Other opinions of the district court in this case, issued pretrial or on such issues as bail,[1] do not address the

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[1] United States v. Newmark, 2007 WL 839077 (motion to dismiss); United States v. Newmark, 2008 WL 2945390 (bail pending appeal).

questions presented, and so are not included in the Appendix to this petition.

JURISDICTION

On April 20, 2010, the United States Court of Appeals for the Third Circuit denied a timely petition for rehearing of its opinion on direct appeal affirming the conviction on Count One. Appx. D. The instant petition is timely filed on or before the first business day within 90 days thereafter. Rule 13.1; 28 U.S.C. § 2101(c). Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTE AND FEDERAL RULE INVOLVED

The **Federal Criminal Code** provides, in pertinent part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire ... communication in interstate or foreign commerce, and writings, signs, signals, pictures or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned ....

18 U.S.C. § 1343.

The **Federal Rules of Criminal Procedure** provide, in pertinent part:

> **Rule 52. Harmless Error and Plain Error.**
>
> * * * *
>
> **(b) Plain Error.** Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

Fed.R.Crim.P. 52(b).

STATEMENT OF THE CASE

Petitioner Brian J. Newmark stands convicted of a single count of wire fraud after an eight-day jury trial of a five-count, two-defendant indictment. The indictment alleged that the misrepresentation making petitioner's dealings with the alleged victims fraudulent was his claim (or his codefendant's) to being a lawyer, made to gain the victims' trust. The evidence showed, however, that petitioner misrepresented himself as a lawyer in a fax to Morgan Stanley, the brokerage company, in order to pressure it to take action to proceed with the transfer of the victims' securities. That misrepresentation could not have had the effect of gaining the victims' trust, as it was neither made to them nor was it intended to, nor did it, come to their attention. In fact, it was made after they had decided to part with the funds the indictment alleged to be the object of petitioner's "scheme or artifice to defraud".

a. Procedural History

A grand jury in the Eastern District of Pennsylvania returned a five-count indictment on August 30, 2006, naming petitioner Newmark and one co-defendant, John Wight. Petitioner was charged in all counts and Mr. Wight in the first four. Counts One and Two charged both defendants with wire fraud, in violation of 18 U.S.C. § 1343, by making a fax transmission and a telephone call on August 31, 2001, respectively, in furtherance of a scheme to defraud Thomas and Arthur Walker, and to obtain money and property from them, by means of false representa-

tions that both defendants were attorneys. Counts Three and Four charged mail fraud, prohibited by id. § 1341, involving mailings in December 2003 by Newmark and Wight of their answers to interrogatories in a related civil lawsuit brought by the Walkers against Newmark, Wight, and others. Count Five charged petitioner alone with making false material declarations under oath in a deposition in a federal civil suit, on January 21, 2004, in violation of id. § 1623(a).

Following an eight-day trial in October 2007, the jury convicted petitioner on Counts One, Three and Five, while acquitting Wight on Counts One and Three. On Count Four, the jury acquitted petitioner Newmark[2] but could not reach a verdict as to Wight. Both defendants filed post-trial motions. On April 4, 2008, the district court issued an order and lengthy opinion granting petitioner's posttrial motion for judgment of acquittal on Counts Three and Five, leaving him convicted only on Count One. App. B. At the same time, the district court granted Wight's motion for judgment of acquittal as to Count Four. The district court later declined to reconsider its refusal to grant a judgment of acquittal or a new trial to petitioner as to Count One. App. C.

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[2] At the close of the government's case, based on the defense motions for judgment of acquittal, the district court ordered Count Two dismissed. (The government conceded insufficiency as to this count.) Later, the court properly entered a judgment of acquittal on Count Two, rather than a dismissal.

On July 25, 2008, after lengthy sentencing proceedings, the district court imposed a sentence of 24 months' imprisonment, to be followed by three years' supervised release, as well as a $6000 fine and the required $100 assessment.

On appeal,[3] the Third Circuit affirmed in a non-precedential opinion. App. A. The court of appeals rejected all three of petitioner's arguments. First, it held that the evidence of wire fraud was sufficient. Petitioner had argued that the record did not support beyond a reasonable doubt that Newmark even had knowledge of, much less that he devised and participated in, the scheme alleged in the indictment to defraud the Walkers by misrepresenting himself and Wight as attorneys in order to gain the Walkers' trust. App. A4-A6. Second, the court below rejected petitioner's argument that reversal was required due to an error in the jury instructions. The court of appeals' opinion acknowledged that the jury instruction defining what constitutes a "scheme or artifice to defraud" contained a key error, in that the charge failed to advise the jury that a criminal fraud scheme must be one "reasonably calculated to deceive persons of ordinary prudence and comprehension." The panel concluded that the instructional error did not "seriously affect the fairness, integrity or public reputation of judicial proceedings" as required to satisfy the plain error rule, because evidence suppor-

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[3] The government did not file any cross-appeal of the post-trial acquittal orders.

ting the defense "was outweighed by the countervailing evidence ...." App. A8. Third, the Third Circuit held that there was no prejudicial error in the determination of the sentence. App. A8-A10.

Rehearing was denied by Order filed April 20, 2010. App. D. This petition follows.

b. Statement of Facts

Petitioner Newmark owned and operated insurance and financial products companies. John Wight, the co-defendant, worked for Newmark as a commissioned salesman. Petitioner had a business association with an estates lawyer, Barry Bohmueller, providing advertising and marketing to attract clients for Bohmueller's estate planning services. CA3-2App. 611-12, 616, 618.[4] Newmark's business also acted as notary and delivery agents of wills and trust documents that Bohmueller would prepare. After delivering and notarizing these legal documents, petitioner or his agent would attempt to sell the client insurance and financial products. CA3-3App. 760. Neither Newmark nor Wight is or ever was an attorney. CA3-2App. 721.

Arthur and Thomas Walker were childless, never-married brothers. The Walkers had long operated a successful business. As of 2001, when they

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[4] In this petition, "CA3-2App." refers to volume 2 of the appendix filed in the Third Circuit on appeal. "DDE" refers to district court docket entry numbers. "GX" and "DX" refer to government and defense exhibits at trial, respectively.

were in their mid-80s, the Walkers also had substantial assets in real estate and securities. CA3-2App. 270-71, 288-89, 328-30; CA3-3App. 954.

A Newmark employee went to the Walkers' home in June 2001 to talk about Bohmueller's services. See 2App. 274-75, 281, 337-41, 344. The Walkers agreed to ahve Bohmueller draft various estate documents for them. See CA3-2App. 208-11, 227, 287, 363-64. The papers signed that day (which bore only Bohmueller's name) included identical "Consultation Request" forms, GX9A-9B, asking that Bohmueller set up "a free, no-obligation consultation with a financial services representative who is also a licensed insurance agent." CA3-3App. 1240-41; see also CA3-2App. 362, 406-09.

Three weeks later, Wight delivered the Bohmeuller-drafted documents to the Walkers and notarized their signatures on the documents. 2App. 371. Neighbors of the Walkers witnessed the signatures. These neighbors both testified that, when they entered the Walkers' house that day, Thomas Walker introduced Wight to them as the brothers' attorney. One of the neighbors testified that he did not remember Wight saying anything when this mistaken introduction was made, CA3-2App. 249, and the other testified that Wight never told her that he was not an attorney. 2App. 233. Thomas Walker testified that Wight told him and Arthur Walker that Wight was an

attorney, CA3-2App. 283, but could not recall when Wight had said this. CA3-2App. 444.[5]

Newmark himself never went to the Walkers' home and never met or spoke with either Arthur or Thomas Walker, in person or on the telephone. CA3-2App. 305-06, 425-26. Nor was any evidence presented that Newmark directed Wight to represent himself to the Walkers as an attorney, or that Newmark had any conversation with Wight at any time concerning Wight's doing so.

After obtaining their signatures on the Bohmueller estate planning documents, Wight talked to the brothers about their "financial estate planning goals." CA3-3App. 776-77. After this first meeting, Wight consulted with petitioner. Wight then delivered a joint recommendation that the Walkers purchase charitable gift annuities through a certain Christian evangelical foundation. CA3-3App. 780, 784-85, 789, 793-95. The Walkers accepted this recommendation and executed forms to transfer securities from their Morgan Stanley account to effect the purchase.

Upon receiving the executed transfer requests, Morgan Stanley sent an investment adviser to the Walkers' home. The Walkers thereupon reversed

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[5] During one visit to the Walker home (which visit was not identified at trial; it may have been much later), Wight gave the Walkers a Bohmueller Law Office business card on which Wight had written both his own and Bohmueller's telephone numbers. CA3-2App. 282, 562.

their decision, CA3-2App. 292-294, 421-22, but the next day Wight returned and convinced them again to proceed with purchasing the annuities. CA3-2App. 294-95. Working at the office, petitioner drafted letters for the Walker brothers to sign expressing frustration with Morgan Stanley and directing the company to proceed with the transfers. CA3-3App. 1232; GX90. The Walkers signed these letters and petitioner transmitted them to Morgan Stanley. CA3-2App. 579-80, 622-25.

Ten days later, petitioner telephoned a Morgan Stanley compliance analyst, Christopher Zeyer. CA3-2App. 462, 640. He then faxed materials to Zeyer (CA3-2App. 468), noting that the transfer of the securities had "already taken one month" and "request[ing] your immediate attention." CA3-2App. 469; see also CA3-2App. 540 (notes of Morgan Stanley officer manager). The cover sheet of petitioner's fax to Zeyer, dated August 31, 2001 (CA3-3App. 1239; GX91), was the basis of the Count One wire fraud charge, the sole surviving conviction.

This fax cover sheet has the words "Bohmueller Law Offices" printed across the top and the law firm's address across the bottom. Instead of the Bohmueller firm's telephone and fax numbers, however, it has the phone and fax numbers of petitioner's separate office. CA3-2App. 372, 643-48. The fax, from Newmark to Zeyer, did not specifically identify petitioner as an attorney but said that correspondence was attached between "my clients" and "your company." CA3-2App. 469, 649. The fax included letters signed by Thomas

and Arthur Walker directed to the Morgan Stanley Transfers Department and to a Morgan Stanley attorney, and a letter purportedly from the Walkers and addressed to the CEO of Morgan Stanley. CA3-2App. 471-77. The latter referred to "our attorney's office" having contacted an individual at Morgan Stanley "concerning the delayed transfer of Morgan Stanley accounts to the New Life Corporation." CA3-2App. 471. Morgan Stanley then complied.

The Walkers' puchase of $3.5 million of charitable gift annuities through New Life Corp.'s National Community Foundation, consumed almost all of their liquid assets. CA3-2App. 609, 721, 954, see CA3-3App. 819-23; DX106, DX109. These annuities provided exactly what the Walkers had been promised: every month, each brother received approximately $13,000. CA3-3App. 956; DX106. From these purchases, petitioner earned a commission of $230,408, out of which he paid Wight a commission of $69,740. CA3-2App. 721. Through expert testimony, the government sought to establish that this investment was unsuited to the Walkers' ages and financial goals. See CA3-2App. 661-713. The government never claimed that the charitable annuities were not a genuine and valid investment product or that they were not executed appropriately during the time they were in existence.

About 18 months later, the Walkers changed their minds again. CA3-2App. 548. They retained counsel and in June 2003 brought a federal civil action against Newmark's companies, petitioner

himself, Wight and Bohmueller. CA3-2App. 306, 383-84, 397, 399, 549, 725. The suit eventually settled, with the Walkers receiving a refund (less the $723,172.69 in combined total monthly annuity payments already received) without any acknowledgment of fault on the defendants' part. CA3-2App. 725.

In his deposition in connection with the civil suit, petitioner admitted that he "must have made ... up" the fax cover sheet, CA3-2App. 648, but denied intending to hold himself out as an attorney to Zeyer or anyone else. CA3-2App. 640-42, 650-51. Zeyer testified that he did not have a distinct recollection of the phone call with petitioner, CA3-2App. 480, but Zeyer's contemporaneous notatitions reflected that he understood petitioner to be the Walkers' attorney: it identified petitioner as "Attorney for Arthur and Thomas Walker" and repeatedly referenced Newmark as "attorney." CA3-2App. 462-65; see also CA3-2App. 537. No evidence was presented at trial that either of the Walker brothers was aware of petitioner's fax to Zeyer or telephone conversations with Zeyer or anyone else at Morgan Stanley.

c. Statement of Lower Court Jurisdiction

The United States District Court for the Eastern District of Pennsylvania had subject matter jurisdiction of this case under 18 U.S.C. § 3231; the indictment alleged federal offenses committed there. The court of appeals had jurisdiction under 28 U.S.C. § 1291.

REASONS FOR GRANTING THE WRIT

Petitioner was convicted on a single count of wire fraud, and acquitted of all other charges. Two important questions in this case directly undermine the integrity of that isolated verdict, warranting this Court's attention. The importance of the questions is enhanced because the case arises in the context of a wire fraud prosecution where a lawful investment sales practice that a jury might find distasteful was characterized as criminal on the basis of doubtful and ambiguous evidence. The line between permissible salesmanship and fraud is a thin one, risking conviction of the innocent (and deterrence of lawful economic activity) unless the courts adhere strictly in this context to high standards of proof and clear jury instructions.

1. The Circuits are divided on the question whether a false representation to a third party, who is not to the alleged victim, can satisfy the required proof of a "scheme or artifice to defraud" that victim of money or property under the federal mail or wire fraud laws.

The indictment in this case charged that petitioner "devised and intended to devise a scheme or artifice to defraud" the Walker brothers of their "money or property," by inducing them to transfer their substantial securities portfolio from a Morgan Stanley brokerage account to a charitable life annuity. From this transaction, petitioner stood to

gain a large commission. Nowhere was it alleged that the annuity was not genuine, or that its features and benefits were misrepresented by petitioner or the agent who handled the transaction. (Nor was any such thing later proven.) All that was alleged to have made the transaction fraudulent was misrepresentations by petitioner and his co-defendant (the salesman, later acquitted) that one or both of them was an attorney. The government theorized that this misrepresentation was made to gain the victims' trust.

The evidence at trial, however, did not bear out this precise allegation beyond a reasonable doubt, as both the jury and the district court eventually agreed. Nevertheless, petitioner's conviction was upheld on the basis that he misrepresented himself as an attorney, not to the victims (to gain their trust) but rather to Morgan Stanley (to secure their compliance with the alleged "victims' demand to transfer their assets). In the Third Circuit and several others, a misrepresentation of this sort, made to some one other than the alleged victim, suffices to make a transaction fraudulent. App. A5. In other circuits, it does not. This Court should grant certiorari to resolve this conflict.

The Second and Ninth Circuits, with support from the Eleventh, have held that to constitute a federal mail or wire fraud, the alleged deceit or misrepresentation must be directed at the specified victims for the purpose of depriving them of their money or property. See United States v. Lew, 865

F.2d 219 (9th Cir. 1989); United States v. Evans, 844 F.2d 36, 38-39 (2d Cir. 1988); see also United States v. Bailey, 123 F.3d 1381, 1390 n.12 (11th Cir. 1997) (accepting Lew as correct). These cases rely on a careful reading and exposition of this Court's precedents, including McNally v. United States, 483 U.S. 350 (1987), and Hammerschmidt v. United States, 265 U.S. 182, 188 (1924). Other circuits, including the court below (App. A5, relying on United States v. Olatunji, 872 F.2d 1161, 1168 (3d Cir. 1989)), take the opposite view.[6] See, e.g., United States v. McMillan, 600 F.3d 434, 447-50 (5th Cir. 2010) (recent and extended discussion of issue); United States v. Blumeyer, 114 F.3d 758, 767-78 (8th Cir. 1997); United States v. Consentino, 869 F.2d 301, 307 (7th Cir. 1989).[7] This conflict in the Circuits is

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[6] Petitioner does not count as in conflict those circuits which have merely noted that the misrepresentation, to trigger a federal fraud charge, need not have been made directly to the victim. See, e.g., United States v. Kennedy, 64 F.3d 1465, 1476 & n. 13 (10th Cir. 1995). We do not contend otherwise. Nevertheless, the person whose property is allegedly to be taken by fraud must be the one intended to be deceived, either directly or indirectly.

[7] The First Circuit, apparently uniquely, applies a different interpretation in civil RICO cases based on mail fraud than it does in criminal cases of mail or wire fraud. Compare McEvoy Travel Bureau, Inc. v. Heritage Travel, Inc., 904 F.2d 786, 793-94 (1st Cir. 1990) (object of deception must be person to be deprived of property), with United States v. Christopher, 142 F.3d 46, 53-54 (1st Cir. 1998) (opposite conclusion).

deeply entrenched, having persisted for over 20 years.

The Second and Ninth Circuits' view is more logical and better tied to the statutory text. Mail or wire fraud requires that the defendant have at least attempted to devise a "scheme or artifice to defraud" someone "of money or property" "by means of false or fraudulent pretenses, representations, or promises."[8] As the Second Circuit reasoned, "If a scheme to defraud must involve the deceptive obtaining of property, the conclusion seems logical that the deceived party must [be the one intended to] lose some money or property." Evans, 844 F.2d at 39, citing language from McNally. See also Cleveland v. United States, 531 U.S. 12, 18-20 (2000).

As the district court recognized, the scheme charged in petitioner's indictment was a narrow one. Count One alleged only a scheme to defraud the Walkers, and no one else -- by means of the defendants' misrepresenting themselves to be attorneys, to gain the Walkers' trust as a trick for selling them the annuities. For instance, in arguing against petitioner's post-trial motion, the prosecutor said, referring to Wight, that "the scheme is whether he lied to these old men about being an attorney. That is the heart and soul of this scheme." CA3-2App. 744; see also DDE:90 (Gov't Trial Mem., 10/15/07, at 4: "Everything that happened to the Walkers flowed from the simple but very successful deceit that Mr. Wight was an attorney acting in the Walkers' best

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[8] See Statute Involved, ante.

interests."). The trial judge agreed. App. C4; see also DDE:50 (Mem.Ord. on Pretrial Mtns., 3/15/07, at 14; 2007 WL 839077).[9] The alleged scheme, after all, was to defraud the Walkers of property (securities, to be liquidated and used to purchase an annuity, generating a commission for petitioner) by means of misrepresenting the two defendants as attorneys, not a scheme to defraud Morgan Stanley out of its position as the Walkers' investment adviser.

The district court found in denying the motion for judgment of acquittal on Count One that the evidence of petitioner's having devised or participated in the scheme to defraud the Walkers, as charged in the indictment, was "not overwhelming." App. B28. In discussing its reasoning for granting a judgment of

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[9] The indictment mentioned two other alleged misrepresentations: an allegation that Wight falsely claimed to the Walkers that he and petitioner had carefully considered various investment vehicles and had chosen the charitable annuity as best-suited for their goals, and petitioner's later representations to Morgan Stanley. The first of these other allegations was never proven at trial (there was some evidence that Wight made such a statement to the Walkers, but none that the statement was false). The second was the subject of much testimony, but as discussed under this Reason (and as the court below correctly recognized), any misrepresentation by petitioner to Morgan Stanley was at best circumstantial evidence of his knowledge of and participation in the scheme alleged in the indictment; any such statement by petitioner could not by itself turn the lawful selling of a dubious investment vehicle into a criminal fraud.

acquittal on Count Three, which charged mail fraud, the district court noted, in words relevant to the Count One analysis as well:

> To be clear, the Government did not produce any direct evidence that a "scheme" existed at all. .... The Government's proof consisted entirely of circumstantial evidence of Mr. Wight's interaction with the Walkers, Mr. Wight's interaction with Mr. Newmark, and Mr. Newmark's interaction with Morgan Stanley.

App.B54. Likewise, in Count One petitioner was charged with wire fraud, "for the purpose of executing the scheme" to defraud the Walkers, by faxing a demand to Morgan Stanley on a made-up Bohmueller Law Firm fax cover sheet to turn over the Walkers' investments. Limiting any evidentiary review to whether the Walkers were deceived or lied to, the evidence would have been insufficient. Adherence to the Third Circuit's view, not requiring that the misrepresentation that turns selling into fraud have been made to the designated victim, thus fatally prejudiced petitioner by causing his sole conviction to be sustained rather than reversed.

To resolve the split in the circuits on the question whether a "scheme to defraud" a person of money or property can be established by proving a misrepresentation to a third party having no effect on the alleged victims' willingness to part with their "money or property," the writ should be granted.

2. The lower courts are in need of further clarification of the third and fourth prongs of this Court's test for assessing "plain error," where the court below claimed that the "fairness, integrity or public reputation" of the proceedings was not affected by an erroneous instruction on the key issue in the case, capable of misleading the jury into convicting an innocent person, on the sole basis of the court of appeals' subjective conclusion that documentary evidence that there was no misrepresentation was "outweighed" by other testimony.

The jury instructions in petitioner's case omitted a key aspect of the definition of "scheme or artifice to defraud" which has been recognized as critical in cases of this kind since the 1870s when the mail fraud law was enacted -- that the scheme be one "reasonably calculated to deceive a person of ordinary prudence and comprehension." Although part of the Third Circuit Model Instructions on mail fraud,[10] and required by Circuit case law, the court omitted this concept from its charge. Defense counsel failed to object. The Third Circuit's resolution of the resulting "plain error" problem on appeal gives rise to the second question. In conflict with a proper understanding of Fed.R.Crim.P. 52(b), the appellate panel declined to reverse, because, it its view, the proof of

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[10] See Model Jury Instruction 6.18.1341-1 (3d Cir. 2007).

lack of "ordinary prudence" by the Walkers was "outweighed" by "countervailing evidence." App. A8.

As this Court determined in McNally, the term "defraud" as of 1872, when the fraud law was first adopted, as in 1909, when it was last amended -- and as currently used in 18 U.S.C. § 1343 (wire fraud)[11] -- means to deprive another, by deceit or misrepresentation, of money or property. 483 U.S. at 356-59.[12] The trial court gave no definition or explanation of "scheme to defraud" anywhere in its instructions.[13] Worse, the trial court (as requested by the government) did give an instruction -- designed and properly used only to balance and limit the "ordinary prudence" rule -- that:

> It is immaterial that the alleged victims may have acted gullibly, carelessly, naively or negligently, which led to their being defrauded. [¶]The alleged victim's

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[11] See Pasquantino v. United States, 544 U.S. 349, 355 n.2 (2005); Neder v. United States, 527 U.S. 1, 20 (1999) (no difference between "fraud," as term is used in mail fraud statute and same concept in wire fraud law).

[12] Of course, the precise holding of McNally was superseded, in part, by the later enactment of 18 U.S.C. § 1346 ("honest services" fraud). See Skilling v. United States, 561 U.S. -- (June 24, 2010). The latter statute is not pertinent here.

[13] In addition, the trial court explained "scheme to obtain money or property" as though that were a separate offense from "scheme to defraud," which it is not. See McNally v. United States, 483 U.S. 350, 358-59 (1987).

> negligence is not a defense to criminal conduct. It is no defense to say that a scheme should not have deceived the victims.

CA3-3App. 1191. Petitioner's trial counsel did not object to this portion of this government-proposed instruction after the jury was instructed, as required by Fed.R.Crim.P. 30(d). CA3-3App. 1201-03.[14] The "victim negligence" language does not appear in the Circuit's Model Instruction defining scheme to defraud, nor is it referred to in the model instruction's commentary. Nevertheless, as a limitation on and counterbalance to the "ordinary prudence" instruction, it is rooted in older but still viable precedent such as Pearlstein. See United States v. Dobson, 419 F.3d 231, 239 (3d Cir. 2005). Absent the correct "ordinary prudence" charge, however, the delivery of a "victim negligence" instruction can only have been confusing to the jury, or worse.

The omitted "ordinary pruduce" instruction is not a local Third Circuit anomaly. It is well grounded in 19th Century fraud law, as this Court's cases teach is the proper method for construing the statutory language. See Cleveland v. United States, 531 U.S. 12, 18-20 (2000); Neder v. United States, 527 U.S. 1, 21-23 (1999); McNally v. United States, 483 U.S. 350,

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[14] See Jones v. United States, 527 U.S. 373, 387 (1999). Nor did counsel object when the instruction was proposed. See CA3-3App. 914-15 (charge conference). Finally, the defense did not propose any instruction of its own on this point.

356-59 (1987); see also Pasquantino v. United States, 544 U.S. 349, 359-68 (2005). Indeed, this very issue arose in the earliest reported federal case construing the mail fraud statute, and resulted in dismissal of the indictment. See United States v. Fay, 83 F. 839 (E.D.Mo. 1897) ("a scheme to defraud ... manifestly must involve ... some such device as, in itself, is reasonably adapted to deceive persons of ordinary comprehension and prudence").[15]

Early 20th Century cases, roughly contemporaneous with the 1909 amendment of the statute, tell the same story. For example, in Etheredge v. United States, 186 F. 434 (CCA 5th 1911), the court reversed the failure to grant a demurrer (judgment of acquittal), squarely basing its holding on the "ordinary prudence" doctrine:

> [I]t takes something more than the mailing of a letter with a fraudulent intent to constitute 'a scheme or artifice to defraud' within the meaning of the statute. ... [T]he scheme [must be] of such a character, if

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[15] The Fay decision was cited in the Final Report of the Commission to Revise and Codify the Criminal and Penal Laws of the United States, which recommended what became the 1909 revision of the mail fraud law, as a case relied upon in making its "emendations" to the statutory language. S. Doc. No. 68, 57th Cong., 1st Sess., pt. 2, at 63 (May 15, 1901) (marginal note). In McNally, 483 U.S. at 357 n.7, this Court referenced the citation of Durland v. United States, 161 U.S. 306 (1896), in the same note of the Commission's Final Report as authority that the 1909 amendment codified Durland's holding.

> truly presented, as would ordinarily deceive a person capable of attending to his own affairs. If the plan does not have these characteristics, ... [it] does not constitute 'a scheme or artifice to defraud' ....
>
> * * * *
>
> The purpose of the statute was to prevent the circulation through the mails of cunning appeals to human passion for gain by untruthful and seductive embellishment of advantages ..., begetting confidence where it would not otherwise be bestowed, and luring persons of ordinary prudence and intelligence into fraudulent transactions and ventures, in which they would not otherwise be persuaded to embark.

Cf. Bradley v. Andrus, 107 F. 196 (3d Cir. 1901) (victim of civil fraud who failed to exercise "ordinary prudence" cannot recover in assumpsit for accepting a bad check).

The 1870 revision of Justice Story's treatise on equity, which the Court consulted in Neder as a prime contemporaneous source for understanding the requirements of "fraud" in the mail and wire fraud statutes, 527 U.S. at 22, stated, in discussing what Story called "actual fraud":

> Nor is it every wilful misrepresentation even of a fact, which will avoid a contract upon the ground of fraud, if it be of such a nature that the other party had no right to place reliance on it; for courts of equity, like courts of law, do not aid parties who will not use their own sense and discretion upon matters of this sort.

1 Joseph Story, Commentaries on Equity Jurisprudence § 199, at 201 (10th ed. Isaac Redfield 1870). As this Court stated in Farrar v. Churchill, 135 U.S. 609, 615 (1890), to win relief on account of a "fraudulent representation" the complainant must have had "a reasonable belief that it was true."

"Courts of equity," Story went on to note in his 1870 discussion of fraud, "do not sit for the purpose of relieving parties, under ordinary circumstances, who refuse to exercise a resonable [sic] diligence or discretion." Id. § 200a, at 203.[16] These ideas have roots

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[16] Justice Story's entire theory of "constructive fraud," by contrast, was designed to show how the rule with respect to fiduciary and other special relationships (and the rule for those on whom duties are imposed by a particular law) is completely different. Finally, even in the absence of a special relationship, Story writes, fraud can consist of taking "unconscientious advantages" over those "disabled by weakness, infirmity, age, lunacy, idiocy, drunkenness, coverture, or other incapacity, from taking due care of, or protecting their own rights and interests." Id. § 221, at 223 (emphasis added). To be "disabled" by "age," Story makes clear, and thus exempted from the rule of ordinary prudence, requires the complainant to be either a very young child or a person who is infirm due to "extreme old age": "And it is quite immaterial from what cause such weakness arises; whether it arises from temporary illness, general mental imbecility, the natural incapacity of early infancy, the infirmity of extreme old age, or those accidental depressions which result from sudden fear, or constitutional despondency, or overwhelming calamities." Id. § 234, at 233. It must be remembered, however, that the "prudent person" rule is, in part, an objective one about how the fraud scheme was "designed"; it does not

extending to Roman law. See id. § 202, at 204; 1 Francis Wharton, A Treatise on the Criminal Law of the United States xiii (7th ed. 1874) (Preface, noting that common law requirement of "latency" in law of fraud, "by use of false tokens or tricks, against which ordinary prudence cannot guard," derives from Roman law). Accordingly, the court below was right to conclude that the instructions given at petitioner's trial, by virtue of their omission of the "ordinary prudence" explication of the "scheme or artifice to defraud" element, were erroneous.[17]

Language referring to the "victim's gullibility" and "victim negligence" is a relatively modern caveat to the "ordinary prudence" or "average comprehension" requirement. In most cases, when coupled with the "ordinary prudence" instruction, petitioner would not describe the "negligent victim is no defense" language as error. An instruction with the "gullibility or negligence" language standing alone, on the other hand, as here, was highly prejudicial and unfair. It provided the jury with an incomplete instruction which turned the legal actual standard on its head. Accordingly, as the court below correctly held, the failure to explicate the "ordinary prudence" rule as a

_____(cont'd)

address the vulnerability of particular victims except insofar as this influenced a defendant's alleged "intent to defraud."

[17] Nevertheless, some circuits disagree. See, e.g., United States v. Svete, 556 F.3d 1157 (11th Cir. 2009) (en banc).

key aspect of "scheme to defraud" was critical and prejudicial error. App. A6-A7.

It is unclear whether the Third Circuits's decision to affirm, notwithstanding the error it correctly found, turned on its application of the third, "substantial rights" prong of this Court's "plain error" test, or on the fourth, discretionary, "fairness and reputation" prong. See United States v. Olano, 507 U.S. 725, 732-36 (1993). On the one hand the court below declared that "the omission of the 'ordinary prudence' instruction did not prejudice the jury's deliberations." App. A7. It was in this paragraph that the panel (wrongly) declared the evidence favoring the defense to be "outweighed by the countervailing evidence" supporting the government's theory. App. A8.[18] If so, the plain error test would not be met, and reversal would be precluded. But instead the panel went on to say, "Accordingly, we decline to exercise our discretion" to reverse on the basis of plain error. Id. In support, the opinion cites and quotes from Olano's explication of the fourth prong: that such "discretion should only be exercised where the error 'seriously affects the fairness, integrity or public reputation of judicial proceedings.'" App. A8, quoting 507 U.S. at 736.

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[18] Ironically, the government argued in the court below only that the instruction was not erroneous, and never contended in its brief that a finding of error would not require reversal -- either on the basis of the weight of the evidence or otherwise.

On a proper application of the "substantial rights" question, the court below would have found for petitioner. If there were ever a case where the "ordinary prudence" instruction could have helped the defendant -- specifically to clarify the limitations of the applicability of the "gullibility of the victim" instruction -- this was one. Without the single, alleged misrepresentation that the salesman was a lawyer, all the jury had before it was a clever sales pitch for an expensive and not necessarily optimal investment, directed at elderly customers. Not a single other untruth or concealment of material fact was proven. A jury's sympathies would naturally be with the alleged victims and against the petitioner, even though no crime was committed, at least unless reminded that a criminal "fraud" requires a higher standard than mere unfair advantage.

The omitted instruction would have shown the jury the importance of considering whether repeated written disclosures, which the customer had read and signed, that the salesman was <u>not</u> a lawyer would put a reasonably prudent person on guard not to rely on any oral assurances seemingly to the contrary. Instead, the jury was informed that they were not to consider the possible subjective gullibility or negligence on the part of the Walkers in deciding to purchase the annuities, and nothing else.

The jury was left with the erroneous impression that it was irrelevant whether, viewed objectively, a reasonably prudent person would have been deceived into selecting the charitable annuity as an investment by any representation of Wight that he was an

attorney.[19] After all, plentiful other evidence -- including written documents that the Walkers read and signed -- made quite clear that Wight was not a lawyer, but rather was a financial services representative and insurance agent. See CA3-3App. 1229 (GX2, at 2, ¶4, engagement letter; stating delivery agent not licensed attorney, signed by Walkers), CA3-3App. 1240-41 (DX9A, 9B, Free Financial Consultation Form; stating licensed insurance agent will provide consultation, signed by Walkers); referenced at App. A7-A8.

Thus, to the extent that it would ever be possible to do so, petitioner has shown that the inadequate instruction on "scheme to defraud" probably affected the verdict in his case. See Pipefitters Local 562 v. United States, 407 U.S. 385, 440-42 & n.52 (1972) (erroneous instruction on essential

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[19] The only real evidence of such a misrepresentation was the testimony of the elderly Mr. Walker that he understood Wight to have described himself as an attorney. The alleged failure of Wight to correct Mr. Walker's mistaken statement to the neighbors describing Wight as his attorney is slight evidence at best, since it is much more consistent with simple courtesy, not wanting to correct and thus embarrass Mr. Walker in front of his neighbors over Walker's harmless misstatement, than with any "scheme" to take advantage of that error to trick the customer. The district court rightly dismissed as "far-fetched" the government's attempt to suggest that petitioner had planned in advance that Wight should not correct any such misimpression if it arose. CA3-3App. 1247.

element is plain error, where issue was central and contested, although issue not properly preserved for appeal). Indeed, addressing the continuing applicability of the plain error ruling in Pipefitters after United States v. Olano, 507 U.S. 725 (1993), is itself a reason to grant the petition in this case.[20] On a proper understanding and application of the "third prong," the lack of a correct scheme-to-defraud instruction, needed to counterbalance the victim gullibility/ negligence instruction, prejudiced the jury's deliberations. Thus, to the extent that the decision of the court below is properly understood not to have pretermitted the third prong of a plain error analysis -- demonstrated prejudice -- there can be little doubt that petitioner met that standard. See United States v. Marcus, 560 U.S. --, 130 S.Ct. 2159,

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[20] This Court has held that when a trial court commits the plain instructional error of omitting entirely an element of the offense, and assigning that determination to the judge rather than to the jury, that Sixth Amendment error does not call for reversal if the evidence of record concerning the factual issue was "overwhelming" and "essentially uncontroverted." Johnson v. United States, 520 U.S. 461, 470 (1997). On that basis, essentially equivalent to the standard of harmlessness beyond a reasonable doubt applied to other constitutional errors, the Court in Johnson pretermitted the "substantial rights" question. While the error in petitioner's case was arguably less serious, see id. at 469 (distinguishing omission of element from instructions misstating an element's meaning), the state of the record here is opposite to that in Johnson -- the omitted issue went to the heart of the jury's guilt-innocence decision and the evidence was hotly contested.

2164-66 (2010) (discussing third and fourth prongs).

Because the trial court's error, on this record, did affect petitioner's substantial rights, the court below did not properly or adequately address the question of whether that error also "seriously affected the fairness, integrity or public reputation of the proceedings." See Puckett v. United States, 556 U.S. --, 129 S.Ct. 1423 (2009), citing Olano, 507 U.S. at 732; see also United States v. Cotton, 535 U.S. 625 (2002); Johnson v. United States, 520 U.S. 461, 466-67 (1997). Merely to say, in a single sentence, that the equivocal evidence that Wight misrepresented himself as an attorney -- deemed insufficient by the jury and trial judge alike when measured against a reasonable doubt standard -- had "outweighed" the other evidence did not give meaningful effect to the final prong of this Court's four-part test. Written documentation (requiring the clients' signatures) had been provided to ensure a lack of misunderstanding of the dual and separate roles of the attorney's messengers who doubled as insurance and annuity salesmen. See App. A7-A8. It is apparent that the lower courts continue to require this Court's guidance on the important question of how to distin-

guish the third and fourth prongs of the Olano test,[21] and how to apply the fourth in a case where the jury's ignorance of the very point intended to be clarified by an omitted jury instruction could readily have led to the conviction of an innocent person.

For this reason as well, the petition for a writ of certiorari should be granted.

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[21] In the analogous setting of a § 2255 appeal, where defendants also bear the burden of establishing an impact on their substantial rights, the Second Circuit has held that it is improper for the court to "undertake a weighing of the evidence." United States v. Zillgitt, 286 F.3d 128, 139 (2d Cir. 2002) ("We conclude that the relevant question is not whether there was sufficient evidence supporting [the verdict affected by erroneous instructions], but rather whether there was sufficient evidence supporting" the defendant's version). The First Circuit, in a direct appeal/ plain error setting, has expressly disagreed with the Second on this. United States v. Soto-Beniquez, 356 F.3d 1, 50 (1st Cir. 2003).

CONCLUSION

This Court should grant this petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit affirming Brian Newmark's conviction and sentence.

Respectfully submitted,

PETER GOLDBERGER
Counsel of Record
PAMELA A. WILK
50 Rittenhouse Place
Ardmore, PA 19003
(610) 649-8200
Attorneys for Petitioner

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United States Court of Appeals, Third Circuit.

UNITED STATES of America

v.

Brian J. **NEWMARK**, Appellant.

No. 08-3356.

Submitted Under Third Circuit LAR 34.1(a)
Feb. 10, 2010.
Filed March 12, 2010.

On Appeal from the United States District Court for the Eastern District of Pennsylvania, (D.C. No. 2-06-cr-00447-GP-1), District Judge: Hon. Gene E.K. Pratter.

Richard A. Lloret, Esq., Laurie Magid, Esq., Office of United States Attorney, Philadelphia, PA, for United States of America.

Peter Goldberger, Esq., Ardmore, PA, for Appellant.

Before SLOVITER, ROTH and TASHIMA,* Circuit Judges.

OPINION

TASHIMA, Circuit Judge.

*1 Brian Newmark appeals his conviction and

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* Hon. A. Wallace Tashima, Senior Judge, United States Court of Appeals for the Ninth Circuit, sitting by designation.

sentence of 24 months' imprisonment for a single count of wire fraud, under 18 U.S.C. § 1343. (App.1-3.) We have jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742, and we will affirm.

I.

Newmark owned and operated companies that performed advertising and marketing services for Barry Bohmueller, an estates attorney. (App.611-12, 615-18, 631, 760.) Newmark employed Victoria Larson and hired an independent contractor, John Wight. (App.548, 631-32, 759.) None of the three individuals has ever been an attorney. (App.721.)

Larson placed a sales call to Arthur Walker and Thomas Walker (the "Walkers"), elderly, unmarried and childless brothers who lived together in a house they jointly owned and whose assets were valued in excess of $3.5 million. (App.270-72, 325-37, 608-09, 721.) The Walkers requested estate planning services from Bohmueller's firm. (App.363-64.) They also signed "Consultation Request Forms," asking Bohmueller to set up a "free, no-obligation consultation with a financial services representative who is also a licensed insurance agent." (App.362-63, 406-09.)

Wight delivered and explained the Bohmueller-prepared documents to the Walkers. (App.370-72.) The Walkers introduced Wight to neighbors as their lawyer, and Wight did not correct them. (App.249, 309.) After the Walkers executed the documents, Wight, pursuant to Newmark's companies' business model, shifted to pitching them insurance-related and financial products. (App.772-76.) Wight then

discussed the Walkers' investment objectives with Newmark, who recommended selling the Walkers charitable gift annuities. (App.780-81, 785-86.)

Wight persuaded the Walkers to execute contracts to purchase six annuities using the bulk of their net worth. (App.721, 819-23.) The purchase required the Walkers to liquidate and transfer assets that were being managed by Morgan Stanley. (App.288-90.) A Morgan Stanley representative visited the Walkers' home and convinced them to rescind their liquidation instructions because they did not need to purchase the annuities in order to accomplish their goals. (App.292-93.)

After learning of the Morgan Stanley visit, Wight returned to the Walkers' home with a portable fax machine. (App.293-94, 622.) Wight conveyed information about the Morgan Stanley visit over the phone to Newmark, who composed two letters that were to be from Arthur and Thomas Walker, respectively, complaining about the Morgan Stanley visit. (App.622, 1232.) Newmark faxed the letters to Wight, who had the Walkers sign them. (App.622.) The letters were then faxed to Morgan Stanley's Scranton, Pennsylvania, office. (*Id.*) A week later, Wight returned with two more letters complaining of Morgan Stanley's failure to transfer the funds. (App.624-25.) These letters were signed and faxed to Morgan Stanley's New York City office. (*Id.*)

Morgan Stanley still having failed to comply with the Walkers' request, Newmark called Morgan Stanley's compliance department in New York City and spoke to Chris Zeyer about the firm's failure to transfer the funds. (App.460-64.) The same day, Newmark sent a

fax to Zeyer, in which Newmark referred to the Walkers as "my clients." (App.468-69, 648-49.) The fax transmittal sheet had "Bohmueller Law Offices" letterhead, which Newmark later testified in a deposition he "must have made ... up." (App.648, 1239.) The fax also referred to "our attorney's office" having contacted an individual at Morgan Stanley regarding the delayed transfer. (App .471.) After the call, Zeyer completed a "verbal complaint form" from his handwritten notes, identifying Newmark as the Walkers' attorney. (App.462-65, 481.)

*2 Morgan Stanley eventually released the assets, enabling the Walkers to purchase the six annuities. Newmark's company earned $230,408 in commission, from which it paid Wight $69,740. (App.721.) Eventually, the Walkers came to feel unsatisfied with the annuities and retained an attorney, who sued Newmark, Wight, and others in federal court. (App.547-51, 725.) The lawsuit settled. (App.725.)

A Grand Jury indicted Newmark and Wight, charging them with mail and wire fraud, and charging Newmark with making a false declaration under oath (in connection with discovery responses he submitted in the civil suit). (App.107-14.) The jury acquitted Wight of two counts and the District Court declared a mistrial as to his third. (App.1224.) The jury convicted Newmark of three of his five counts. (App.1224.) The District Court entered a judgment of acquittal on two of three counts for which the jury had convicted, leaving a conviction for a single count of wire fraud based on the fax Newmark transmitted to Zeyer. (App.2.)

On appeal, Newmark argues that the evidence was insufficient to support conviction, that the district court erred in refusing to give an "ordinary prudence" jury instruction, and that the district court miscalculated "loss" for sentencing purposes. (Appellant's Br. 17-19.)

II.

We exercise plenary review of the District Court's denial of a motion for judgment of acquittal based on insufficient evidence. *See United States v. Silveus*, 542 F.3d 993, 1002 (3d Cir.2008). We must determine whether the evidence, viewed in the light most favorable to the government, would allow a rational trier of fact to convict. *See United States v. Hart*, 273 F.3d 363, 371 (3d Cir.2001) (internal citations and quotation marks omitted).

Newmark contends that the evidence failed to show that he knowingly and willfully devised or participated in the particular scheme to defraud alleged in the indictment. (Blue 17-18.) He argues that the scheme alleged in the indictment was to defraud the Walkers,[1] and the only misrepresentations by Newmark were directed at Morgan Stanley, not the Walkers. (*Id.; see also* Blue 23.)

Newmark concedes that evidence showed the following: Newmark drafted and faxed letters to

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[1] The indictment charged that Defendants "knowingly devised and intended to devise a scheme to defraud [the Walkers], and to obtain money and property from [the Walkers] by means of false and fraudulent pretenses, representations, and promises." (App.108.)

Wight for the Walkers to sign, telling Morgan Stanley to transfer the Walkers' funds; Newmark made misrepresentations to Zeyer at Morgan Stanley; Newmark obtained an "enormous benefit" upon purchase of the annuities; Newmark, as owner and manager of his companies, held supervisory control over Wight. (Gray 6.) This evidence, although circumstantial, is sufficient for a rational trier of fact to have found beyond a reasonable doubt that Newmark knowingly and willfully devised or participated in the scheme to defraud. *See United States v. Pearlstein,* 576 F.2d 531, 541 (3d Cir.1978) (holding that requisite knowledge of fraudulent purpose can be demonstrated circumstantially).

Specifically, Newmark participated in the scheme when he drafted the letters necessary to transfer the Walkers' assets and when he interacted with Zeyer at Morgan Stanley. *See United States v. Olatunji,* 872 F.2d 1161, 1168 (3d Cir.1989) (holding that misrepresentations need not be made to the ultimate victim for mail fraud). That Newmark "made up" a letterhead to misrepresent that he was an attorney-the same type of deception employed by Newmark's paid associates-supports the inference that Newmark also "devised" the scheme, or at least knew of its fraudulent purpose. The jury could find further support in the fact that Newmark received a greater cut of the commission, *cf. Pearlstein,* 576 F .2d at 542 (noting that "relative lack of success enjoyed by" defendant salesmen compared with principals suggested they lacked knowledge of scheme's fraudulent purpose), and held a position as owner and manager of the companies, *cf. id.* (noting that fact that defendant salesmen "held no positions of authority" and were never "involved in the

management" of the company suggested they lacked knowledge of scheme's fraudulent purpose).

*3 Accordingly, we conclude that "there was substantial evidence adduced ... from which the jury reasonably could have inferred that [the defendant] knew of the fraudulent purpose of the ... enterprise and willfully participated therein." *See id.* at 541. The District Court did not err in denying Newmark's motion for a new trial.

III.

Newmark argues that the District Court plainly erred in not giving a jury instruction defining "scheme to defraud" as a scheme "reasonably calculated to deceive persons of ordinary prudence and comprehension." *See United States v. Coyle,* 63 F.3d 1239, 1243 (3d Cir.1995) ("The scheme [to defraud] 'need not be fraudulent on its face but must involve some sort of fraudulent misrepresentations or omissions reasonably calculated to deceive persons of ordinary prudence and comprehension.' " (quoting *Pearlstein,* 576 F.2d at 535)). He argues that the alleged error was "compounded" by the District Court's instruction that "[i]t is immaterial that the alleged victims may have acted gullibly, carelessly, naively or negligently, which led to their being defrauded." (App.1191.) Because Newmark did not object at trial, we review the District Court's refusal to give an "ordinary prudence" jury instruction for plain error. *See United States v. Antico,* 275 F.3d 245, 265 (3d Cir.2001).[2]

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[2] To succeed under plain error review, Newmark must show that (1) the court erred; (2) the error was plain; and (3) the

The Government's argument that the materiality instruction[3] adequately covers the "ordinary prudence" instruction, although supported by a district court case, *see United States v. Zomber*, 358 F.Supp.2d 442, 459 (E.D.Pa.2005), is unavailing. The materiality instruction concerns whether a reasonable person would consider a fact important, whereas the "ordinary prudence" instruction concerns whether a reasonable person would be deceived by a scheme. Moreover, because of the apparent tension between an instruction that a victim's gullibility or negligence is no defense and an instruction that a scheme must be calculated to deceive a person of ordinary prudence and comprehension, there is some force to Newmark's argument that the error was compounded by the district court's inclusion of the former instruction.

Nonetheless, under the plain error standard, we conclude that the omission of the "ordinary prudence" instruction did not prejudice the jury's deliberations. *See United States v. Haywood*, 363 F.3d 200, 207 (3d Cir.2004). Although there was evidence the Walkers signed documents that could be read to indicate that Wight was not an attorney, *see* App. 1229 (engagement letter stating delivery agent not licensed attorney); App. 1240-41

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error affected substantial rights, meaning that the error prejudiced the jury's verdict. *See Johnson v. United States*, 520 U.S. 461, 466-67 (1997). If all three elements are established, we may exercise our discretion to award relief. *Id.*

[3] "A material fact is a fact that would be of importance to a reasonable person in making a decision about a particular matter or transaction." (App.1184.)

(consultation request form stating licensed insurance agent would provide consultation), this evidence was outweighed by the countervailing evidence that Wight affirmatively represented himself as an attorney.

Accordingly, we decline to exercise our discretion to conclude that the District Court committed plain error. *See United States v. Olano,* 507 U.S. 725, 736 (1993) (holding that discretion should only be exercised where the error "seriously affects the fairness, integrity or public reputation of judicial proceedings" (alterations, citations, and quotation marks omitted)).

IV.

*4 We exercise plenary review over the District Court's interpretation of "loss" for purposes of United States Sentencing Guidelines ("U.S.S.G.") § 2F1.1. *See United States v. Badaracco,* 954 F.2d 928, 936 (3d Cir.1992). "Loss" is defined as the value of the money, property, or services unlawfully taken. *See Coyle,* 63 F.3d at 1250. "[T]he loss need not be determined with precision. The court need only make a reasonable estimate of the loss, given the available information." U.S.S.G. § 2F1.1 (2000), Commentary n. 9.

The District Court calculated a loss of $900,000, based on the value of the securities at the time of their sale ($3.5 million), less the value of the annuity received in exchange ($2 million), less the tax benefits obtained by making a contribution of the difference ($600,000). (App. 55-56 (adopting PSR ¶ ¶ 22-25, 30-36).) Newmark argues that this calculation

fails to account for the $316,000 in capital gains taxes the Walkers avoided and the non-monetary value to the Walkers of making a charitable contribution.[4] (Blue 48-49.)

We conclude that the avoidance of capital gains taxes is too speculative to be considered value actually gained because it is not clear when, if at all, the Walkers would have sold their stocks. The non-monetary value is not properly considered because there is evidence that the Walkers did not want to make this type of charitable contribution. *See United States v. Maurello,* 76 F.3d 1304, 1311 (3d Cir.1996) (holding that clients who obtain satisfactory services have received something of value, while dissatisfied clients have not).[5]

Moreover, we conclude that any error was harmless. *See United States v. Flores,* 454 F.3d 149, 162 (3d Cir.2006) (holding that any error in imposing sentencing increases based upon loss calculation and other guidelines was harmless, where sentence imposed fell within the guidelines range that would have applied without the alleged errors). Here, as in *Flores,* the District Court applied the 18 U.S.C. §

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[4] Newmark also argues that because the actual loss is "too complex and unusual to measure 'correctly,' ... the defendant's gain from the fraud is ... the only fair measure of 'loss.' " *See United States v. Yeaman,* 194 F.3d 442, 456-57 (3d Cir.1999). The calculation method used in the Pre Sentence Investigation Report belies the notion that the actual loss is too complex to measure.

[5] *Maurello* was impliedly overruled by the Sentencing Commission in 2001. However, it is nonetheless instructive here because, for ex post facto reasons, the 2000 version of the Sentencing Guidelines applies.

3553(a) factors, rather than a specific departure or variance, to impose a sentence that fell below both the guidelines range the District Court calculated and the range that would be applicable without the alleged errors.[6] Thus it is clear that any "error did not affect the district court's selection of the sentence imposed." *United States v. Langford*, 516 F.3d 205, 218 (3d Cir.2008) (noting that harmless error may exist in "unusual case[s]," like *Flores*, where the sentence was a discretionary sentence imposed "based on 3553(a)'s parsimony provision" rather than a specific variance or departure).

V.

For the reasons set forth, we will affirm the judgment of the District Court.

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[6] The District Court calculated a guidelines range of 30 to 37 months and, applying the Section 3553(a) factors, imposed a sentence of 24 months. (App.61-67.) Taking into account the capital gains taxes allegedly avoided, the applicable range would have been 27 to 33 months. (Blue 48.)

Appx. B

Only the Westlaw citation is currently available.

2008 WL 927961

United States District Court, E.D. Pennsylvania.

UNITED STATES of America

v.

Brian J. **NEWMARK** John N. Wight, Defendants.

Criminal No. 06-447.

April 4, 2008.

Richard A. Lloret, Assistant U.S. Attorney, Philadelphia, PA, for United States of America.

MEMORANDUM AND ORDER

PRATTER, District Judge.

PROCEDURAL BACKGROUND

*1 A federal grand jury returned an Indictment on August 30, 2006, charging Brian J. Newmark and John N. Wight with violations of the federal mail and wire fraud statutes, and charging Mr. Newmark with making a false declaration under oath. The underpinnings of the charges were investment and estate planning transactions involving two elderly brothers, Arthur and Thomas Walker. The Defendants filed several pretrial motions seeking to dismiss the Indictment, all of which the Court dismissed by Memorandum and Order dated March 14, 2007.

A jury trial commenced on October 15, 2007, and on October 24, 2007, the jury rendered a partial verdict.

The jury convicted Mr. Newmark of one count of wire fraud (Count One of the Indictment), one count of mail fraud (Count Three), and one count of making a false statement under oath (Count Five). The jury acquitted Mr. Newmark on one count of mail fraud (Count Four), and the Court dismissed one count of wire fraud (Count Two) following the conclusion of the Government's case. (*See* Trial Tr. vol. 5, 2:23-3:2, Oct. 19, 2007.) [1] The jury acquitted Mr. Wight on

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[1] At the close of the Government's case, both Defendants moved for a judgment of acquittal as to all charges under Rule 29(a) of the Federal Rules of Criminal Procedure. Count Two of the Indictment charged that Mr. Newmark violated the federal wire fraud statute, 18 U.S.C. § 1343, when on August 31, 2001 he made a telephone call using the telephone number (610) 348-8000 to call Morgan Stanley in New York. Court Two also charged Mr. Wight with aiding and abetting Mr. Newmark's alleged violation.

The Defendants moved to dismiss this Count, arguing that the Government failed to prove that Mr. Newmark used the telephone number charged in the Indictment to place the call. The only evidence the Government presented that Mr. Newmark actually used this particular telephone number was the testimony of Chris Zeyer, the Morgan Stanley representative with whom Mr. Newmark spoke on that date. At trial, Mr. Zeyer testified that after he had spoken with Mr. Newmark, he completed a "verbal complaint form" to memorialize the conversation. On that form, Mr. Zeyer had listed as Mr. Newmark's telephone number the number charged in the Indictment. However, at trial Mr. Zeyer testified that he was not sure where he had obtained the telephone number. Mr. Zeyer testified that either Mr. Newmark gave him the telephone number (610) 348-8000 or the number came from Morgan Stanley's account files for Arthur or Thomas Walker. (Trial Tr. C. Zeyer 8:18-9:14, Oct. 17, 2007.)

In the Government's written response to the defense motions at the close of the Government's case, the Government "concede[d] that the proofs at trial concerning the use of telephone number 610-348-8000 are likely insufficient to demonstrate beyond a reasonable doubt that defendant used

Counts One and Three, but was not able to reach a decision with respect to Mr. Wight on Count Four. The Court declared a mistrial as to Mr. Wight on that Count.

Both Defendants moved for a judgment of acquittal at the close of the Government's case under Rule 29(a), and renewed those motions at the close of the entire case. In both instances, the Court reserved its decision on those motions. After the jury convicted Mr. Newmark on Counts One, Three and Five, he renewed his motions under Rule 29(c). In addition, Mr. Newmark moves for a new trial under Rule 33(a), and moves to arrest judgment under Rule 34(a). Mr. Wight also moves for a judgment of acquittal under Rule 29(c) with respect to Count Four.

The parties have filed numerous motions and supporting memoranda.[2] The Court presided over

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this telephone number on August 31, 2001 to contact Mr. Zeyer." (Gov't Resp. 10.) On October 19, 2007, the Court informed counsel for all parties that the Court would dismiss Count Two of the Indictment. (Trial Tr. vol. 5, 2:23-3:2, Oct. 19, 2007.) The Government did not object to the Court's dismissal of Count Two.

At that time, no formal docket entry was made to reflect the dismissal of Count Two. However, counsel and the parties understood that Count Two had been dismissed, and that Count was not submitted to the jury. The Order accompanying this Memorandum will reflect that a judgment of acquittal pursuant to Rule 29(a) will be entered as to Count Two with respect to both Defendants, based on the Court's October 19, 2007 ruling that the Government did not present sufficient evidence to prove beyond a reasonable doubt that Mr. Newmark used the telephone number charged in the Indictment.

[2] Mr. Newmark submitted a Motion for Acquittal Under Rule

oral argument on Mr. Newmark's motions on January 2, 2008. Following the oral argument, counsel for both Mr. Newmark and the United States submitted additional letter briefs seeking to clarify certain issues raised during oral argument.

Each of the defense motions, and the Government's respective responses, are discussed below. Mr. Newmark's Rule 29 Motion will be granted in part and denied in part, and the Court will enter a judgment of acquittal on Counts Two, Three and Five. In addition, Mr. Wight's Rule 29 Motion will be granted, and a judgment of acquittal will be entered on Counts Two and Four.

FACTUAL BACKGROUND

29(a) at the close of the Government's case (Docket No. 96), a Supplemental Brief in support of his Rule 29(a) Motion at the close of the Government's case (Docket No. 110), a Motion for Acquittal Under Rule 29(c), New Trial Under Rule 33(a), and Arrest of Judgment Under 34(a) (Docket No. 111). The Government filed a response to Mr. Newmark's Rule 29 motion (Docket No. 98), and an omnibus response to Mr. Newmark's Rule 29, 33 and 34 motions (Docket Nos. 116, 117). Mr. Newmark filed an omnibus reply brief (Docket No. 118).

After the transcripts of the trial proceedings became available, the parties supplemented their motion papers to include references to those transcripts. Mr. Newmark's "annotated" motion papers were filed at Docket Nos. 131-133, and the Government's annotated response was filed at Docket No. 134.

Mr. Wight filed a Motion for Judgment of Acquittal on Count Four Pursuant to Rule 29 (Docket No. 109).

Each of the filings presented to the Court represents fine professional work by counsel, and the Court compliments counsel and their colleagues for their diligence, in-depth analysis and critical thinking displayed in all of the written and oral submissions.

The following statement represents a brief summary of the evidence that was presented at trial. As appropriate, the evidence is viewed and discussed below in the light most favorable to the Government.

Mr. Newmark owned and controlled various companies that operated within the Commonwealth of Pennsylvania, including BEN Consulting and Funding and Financial Services ("FFS"), which was the predecessor to Estate Planning Advisors Corp. ("EPA"), among others. Mr. Newmark's companies performed advertising and marketing services for Barry Bohmueller, an attorney then licensed to practice in Pennsylvania who specialized in estate planning services. Mr. Newmark is not and never has been an attorney.

*2 Specifically, Mr. Newmark's companies advertised and marketed Mr. Bohmueller's estate planning services, including wills, trusts, powers-of-attorney, etc., through direct mail campaigns and telephone solicitations. Mr. Newmark's promotional efforts on behalf of Mr. Bohmueller targeted individual homeowners over the age of 60 with annual incomes in excess of $15,000. Mr. Newmark's companies employed various individuals, including Victoria Larson, and engaged independent contractors, such as Mr. Wight. Neither Mr. Wight nor Ms. Larson is or ever has been an attorney.

Arthur and Thomas Walker were elderly brothers[3]

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[3] Both of the Walkers were in their 80's during the time period involved here. When the Walkers first encountered the Defendants, Arthur Walker was 80 years old and Thomas

who lived together in Tunkhannock, Pennsylvania[4] in a house that they jointly owned. The Walker brothers previously owned a granite company, and had lived together in Tunkhannock for over 50 years. They also owned a house in Florida. Together, at the time of the operative events, the Walker brothers owned assets valued in excess of $3.5 million.

Victoria Lawson initially placed a sales call to the Walkers' home on June 27, 2001, during which she described various estate planning services that Mr. Bohmueller could provide to them.[5] The Walkers expressed interest in Mr. Bohmueller's services, and Ms. Lawson arranged for Mr. Bohmueller to draft certain trust instruments and ancillary documents for the Walkers.

Shortly thereafter, on July 20, 2001, Mr. Wight personally delivered to the Walkers ostensibly on behalf of Mr. Bohmueller a revocable living trust, financial and durable powers of attorney, a living will, and a "pour-over will," all of which were documents that Mr. Bohmueller had drafted. Mr.

Walker was 82. Thomas Walker was 88 years old when he testified in this criminal trial. Arthur Walker passed away during 2006 before these criminal proceedings began.

[4] Tunkhannock is located in northeastern Pennsylvania, some 125 miles from suburban Philadelphia where Mr. Bohmueller practiced and where Mr. Newmark maintained his businesses.

[5] No evidence was presented as to the circumstances that led to Ms. Larson's first visit to the Walkers' home, so that it was not known whether she arrived out of the blue, whether the Walkers responded to a mass-mailing or solicitation telephone call from one of Mr. Newmark's companies, whether the Walkers were the ones to initiate contact with Ms. Larson, or otherwise.

Wight visited with the Walkers in their home and explained the legal documents to them.

Once the Walkers were prepared to execute the documents, they called upon their neighbors, Gertrude and Murray Fisk, to witness their signatures. One of the Walkers introduced Mr. Wight to the Fisks as the Walkers' attorney. Hearing this introduction, Mr. Wight did not correct the misstatement that he was an attorney. In the presence of the Fisks and Mr. Wight, Arthur and Thomas Walker each proceeded to execute a revocable living trust, financial and durable powers of attorney, a living will, and a pour-over will. Mr. Wight notarized the various documents.

After the Walkers executed the wills and trust documents, Mr. Wight endeavored to sell to the Walkers various insurance-related and financial products. After discussing the Walkers' investment objectives with them, Mr. Wight sought Mr. Newmark's advice as to what might be an appropriate investment opportunity for the Walkers. Mr. Newmark suggested that Mr. Wight should recommend selling the Walkers a charitable gift annuity offered through New Life Corporation of America ("New Life").[6] Mr. Newmark never met with the Walkers personally at any time.

Mr. Wight visited the Walker home on a number of other occasions following his first meeting with the Walkers on July 20, 2001. During these visits, Mr.

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[6] National Community Foundation ("NCF") is a division of New Life, and is a taxexempt charitable organization. NCF is New Life's charitable arm.

Wight learned that the Walkers owned and possessed stock certificates representing approximately $2 million worth of securities.[7] In addition, the Walkers informed Mr. Wight that the Scranton branch of the Morgan Stanley brokerage firm managed an investment portfolio worth approximately $1.2 million for the Walkers.

*3 After several meetings with the Walkers, in early August Mr. Wight persuaded the Walkers to purchase charitable gift annuities through New Life. He also persuaded them to fund the annuities using the bulk of their net worth, i.e., approximately $3.5 million. On August 3, 2001, Mr. Wight again visited the Walkers' home, where the Walkers executed contracts to purchase four annuities, two annuities each. The Walkers eventually executed contracts to purchase six annuities total, three apiece.

Purchasing the annuities recommended by Mr. Newmark required the Walkers to liquidate and transfer their assets that were being managed by Morgan Stanley. On or around August 21, 2001, after Morgan Stanley learned that the Walkers intended to liquidate these assets, Perry Rose, a Morgan Stanley representative from the brokerage firm's Scranton office, visited the Walkers' home. He reviewed documents relating to the New Life annuities and informed the Walkers that, in his view, they did not have to purchase the annuities in order accomplish their estate planning goals. Mr. Rose brought with him to the Walkers' home letters that he had drafted rescinding the liquidation

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[7] The Walkers kept nearly $2 million worth of stock certificates in a safe in their garage in Tunkhannock.

instructions, which letters the Walkers signed. By doing so, the Walkers rescinded their direction to Morgan Stanley to liquidate and transfer their assets to New Life.

The next day, August 22, 2001, after becoming aware of Mr. Rose's visit, Mr. Wight visited the Walkers at home and convinced them once again to proceed with the purchase of the New Life annuities. Mr. Wight had brought a portable fax machine with him to the Walkers' home. Mr. Wight conveyed certain information about Mr. Rose's visit to Mr. Newmark over the telephone. Mr. Newmark then used that information to compose two identical letters nominally from Arthur and Thomas Walker, respectively, addressed to Morgan Stanley's Scranton branch office complaining about Mr. Rose's visit to the Walkers' home. Mr. Newmark faxed those letters to Mr. Wight, which were then given by Mr. Wight to the Walkers, signed by them and then faxed to Morgan Stanley's Scranton branch office on August 22, 2001.

A week later, Mr. Wight visited the Walkers' home again. Mr. Wight brought with him the portable fax machine and two letters that had been drafted by Mr. Newmark and someone from New Life. Again, the letters were drafted to be nominally from Arthur and Thomas Walker, respectively, and were identical in all respects, other than the signatory. Each letter complains that Morgan Stanley had not complied with the Walkers' requests to transfer the Walkers' funds to New Life, and instructs Morgan Stanley to complete the transfer immediately. Mr. Wight obtained the Walkers' signatures on the respective letters, and the letters were faxed to Morgan

Stanley's legal department in New York City on August 29, 2001.

By August 31, 2001, Morgan Stanley still had not transferred the Walkers' funds to New Life. On that date, Mr. Newmark called Morgan Stanley's compliance department in its New York City office and spoke with Chris Zeyer, who was a complaint analyst. Mr. Newmark informed Mr. Zeyer that the Walkers had authorized Morgan Stanley to transfer the Walkers' funds to New Life on August 3, 2001. He described Mr. Rose's visit to the Walkers' home, and informed Mr. Zeyer about the letters from the Walkers to Morgan Stanley complaining about Mr. Rose. Mr. Newmark also informed Mr. Zeyer that on August 29, 2001, additional authorization letters from the Walkers were sent to Morgan Stanley's legal department authorizing Morgan Stanley to transfer the Walkers' funds to New Life.

*4 On the same day that he spoke with Mr. Zeyer, Mr. Newmark sent a facsimile transmittal sheet to Mr. Zeyer on the letterhead of the "Bohmueller Law Offices." In this fax, Mr. Newmark referred to the Walkers as "my clients" and requested Morgan Stanley's immediate attention in order to "resolve" the matter at hand, namely, Morgan Stanley's failure to transfer the Walkers' funds to New Life per the Walkers' requests. Mr. Newmark attached to this communication the several letters described above, which purported to be from either Arthur or Thomas Walker, and which directed Morgan Stanley to execute the requested transfer. This August 31, 2001 facsimile transmission formed the basis for Count One of the Indictment.

After receiving Mr. Newmark's call, Mr. Zeyer completed a "verbal complaint form" in which he memorialized his conversation with Mr. Newmark. On this form, Mr. Zeyer identified Mr. Newmark as "Attorney for Arthur and Thomas Walker."

Mr. Zeyer agreed to contact the Scranton branch office to follow up on Mr. Newmark's complaint. To that end, he forwarded to the Scranton branch office all of the materials that Mr. Newmark had submitted, together with the verbal complaint form, to the attention of Ralph Colo, the Scranton branch manager. Mr. Colo called Mr. Newmark to inquire about his complaint but was not able to reach him.

Morgan Stanley eventually released the Walkers' assets, enabling the Walkers to purchase six annuities from New Life. The Walkers paid approximately $3,522,244 for the annuities. A significant percentage of this purchase price constituted a charitable "gift" to NCF, New Life's charitable arm. Mr. Newmark's company, FFS, earned approximately $230,408 in commissions for these transactions, from which it paid Mr. Wight a commission of approximately $69,740. The annuities Thomas Walker purchased provided him with $13,287.77 in monthly income, while the annuities purchased by Arthur Walker provided him with $13,606.79 in monthly income. The Walkers received these annuity payments through the end of 2003.

After the sale, Mr. Wight made several more visits to the Walkers' homes, both in Pennsylvania and in Florida. Mr. Wight did not attempt to sell the Walkers any additional annuities or other financial products once the original transactions were

consummated in the fall of 2001.

Eventually, the Walkers came to feel that something about the New Life annuities was out of the ordinary. The annuities performed as advertised, including providing the Walkers with a continuous, monthly income stream. It seems, however, that the Walkers may have realized that these annuities may not have been the most beneficial or cost-effective way to accomplish their estate planning objectives. In 2003, the Walkers hired an attorney, Gary Lightman, and in June 2003, they sued Mr. Newmark and Mr. Wight, among others, in federal court.[8]

As part of discovery in the civil suit, both Messrs. Newmark and Wight stated in their respective responses to interrogatories that they had never represented themselves as attorneys for the Walkers. Messrs. Newmark's and Wight's interrogatory responses in the civil suit were mailed on December 16, 2003 and December 17, 2003, respectively. These December 16, 2003 and December 17, 2003 mailings formed the basis for Counts Three and Four of the Indictment. In addition, during his January 21, 2004 oral deposition in the civil suit, Mr. Newmark testified under oath that he had never represented himself as an attorney for the Walkers. Mr. Newmark's allegedly false deposition statement formed the basis for Count Five of the Indictment.

*5 The civil lawsuit settled in 2003. As part of the settlement, the Walkers received a total of $2.9

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[8] The Walkers filed their civil action in the Eastern District of Pennsylvania, docketed as Civil Action No. 03-3750.

million in cash, over and above the combined total of $723,172.69 in monthly annuity payments which they had already received.

DISCUSSION

I. MR. NEWMARK'S MOTION FOR ACQUITTAL UNDER RULE 29

A. Legal Standard Under Rule 29

Rule 29(a) provides as follows:

> (a) Before Submission to the Jury. After the government closes its evidence or after the close of all the evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction. The court may on its own consider whether the evidence is insufficient to sustain a conviction. If the court denies a motion for a judgment of acquittal at the close of the government's evidence, the defendant may offer evidence without having reserved the right to do so.

Fed.R.Crim.P. 29(a).

Rule 29(b) provides that the district court may reserve decision on the motion:

> (b) Reserving Decision. The court may reserve decision on the motion, proceed with the trial (where the motion is made before the close of all the evidence), submit the case to the jury, and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the court reserves decision, it must decide the

> motion on the basis of the evidence at the time the ruling was reserved.
>
> Fed.R.Crim.P. 29(b).

Rule 29(c) provides that the defendant may renew his motion for acquittal within seven days after the jury reached a verdict, and that if the jury has returned a guilty verdict, the court may set aside the verdict and enter an acquittal. Fed.R.Crim.P. 29(c).

In considering a Rule 29 motion, the Court must review the evidence in the light most favorable to the Government. *United States v. McKee,* 506 F.3d 225, 232 (3d Cir.2007). The Court does not re-weigh the evidence or re-assess witness credibility. *Id.* (*citing United States v. Peppers,* 302 F.3d 120, 126 (3d Cir.2002)). Accordingly, the Court must sustain the verdict "'if a rational trier of fact could have found [the] defendant guilty beyond a reasonable doubt, and the verdict is supported by substantial evidence.'" *Id.* (*quoting United States v. Coyle,* 63 F.3d 1239, 1243 (3d Cir.1995)). If there is substantial evidence to support the jury's determination, the Court will "'not disturb the verdict although on that evidence [the Court] might not have made the same decision.'" *Id.* at 232-33 (*quoting United States v. Cooper,* 121 F.3d 130, 133 (3d Cir.1997) (*citing United States v. Hannigan,* 27 F.3d 890, 892 (3d Cir.1994))). Thus, the Court's "inquiry is limited to determining whether the jury's verdict is permissible." *Id.* at 233 (*citing United States v. McGill,* 964 F.2d 222, 229 (3d Cir.1992)). The Court is obliged to refrain from casting itself as a new, one-person jury.

***6** After the Government rested its case-in-chief

here, Mr. Newmark timely moved for acquittal pursuant to Rule 29(a) of the Federal Rules of Criminal Procedure. Accordingly, the Court must decide Mr. Newmark's Rule 29(a) Motion on the basis of the evidence submitted by the Government after it concluded its direct case.

Mr. Newmark raises several arguments in support of his motion. First, Mr. Newmark argues that a judgment of acquittal must be entered as to Counts One and Three because the evidence offered by the Government was insufficient to prove that Mr. Newmark "devised" or "participated" in a "scheme" to defraud the Walkers. Specifically, Mr. Newmark argues that proof that he misled Morgan Stanley is not equivalent to proof that he defrauded the Walkers. Secondly, with respect to Count Three, Mr. Newmark argues that the Government produced insufficient evidence that the subject mailing was "in furtherance" of the charged scheme to defraud the Walkers. Third, with respect to Count Five, Mr. Newmark argues that Chris Zeyer's testimony is insufficient to prove that Mr. Newmark made a false declaration under oath, that the Government produced insufficient proof that his false statement was "material," and that the deposition questions and answers at issue are too ambiguous to form the basis of a false declaration charge. Finally, as to Counts One, Three and Five, Mr. Newmark argues that the Indictment charged him with selling the Walkers a "tax-deferred annuity," while the annuity he actually sold them was a "charitable gift annuity," and, hence, Mr. Newmark argues that this amounts to an impermissible constructive amendment or a variance of the Indictment.

For the reasons discussed below, Mr. Newmark's Rule 29(a) Motion will be granted in part and denied in part, in that a judgment of acquittal will be entered for Mr. Newmark as to Counts Three and Five of the Indictment. Mr. Newmark's Rule 29(a) Motion will be denied in all other respects. In addition, Mr. Newmark's renewed Rule 29 motions, which require the Court to consider all evidence presented at the end of the entire case, will be denied.

B. Counts One and Three - Sufficiency of the Evidence of a "Scheme" to Defraud the Walkers

Count One of the Indictment charges Mr. Newmark with one count of wire fraud based on an August 31, 2001 facsimile transmission from Mr. Newmark to Morgan Stanley, and Count Three charges one count of mail fraud based on Mr. Newmark's December 16, 2003 mailing of his allegedly false answers to interrogatories in the subsequent civil suit initiated against him by the Walkers. The Indictment describes, in part, the scheme that supports the wire and mail fraud counts as follows:

> Defendant **BRIAN J. NEWMARK** designed and implemented, and defendant **JOHN J. WIGHT** implemented, various sales techniques and devices, including oral presentations, documents, letters and business cards, for the purpose of fostering the false impression that defendants were attorneys, or in the employ of an attorney, in order to gain the trust of [the Walkers] and to sell them tax deferred annuities.

*7 (Indictment at 2 ¶ 8.B.)

Conviction on a mail or wire fraud charge requires

proof that the defendant "devised or intended to devise" a scheme to defraud. *See* 18 U.S.C. §§ 1341,[9] 1343.[10] The substantive elements of mail fraud

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[9] The mail fraud statute, 18 U.S.C. § 1341, provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation affects a financial institution, such person shall be fined not more than $ 1,000,000 or imprisoned not more than 30 years, or both.

[10] The wire fraud statute, 18 U.S.C. § 1343, provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation affects a financial institution, such person shall be fined not more than

under 18 U.S.C. § 1341 and wire fraud under § 1343 are: (1) the existence of a scheme to defraud; (2)(a) the use of the mails, whether the United States Postal Service or a private carrier, or (b) the use of interstate wire facilities, "for the purpose of executing" the fraudulent scheme; and (3) culpable participation by the defendant, that is, participation by the defendant with specific intent to defraud. *See United States v. Dobson*, 419 F.3d 231, 236-37 (3d Cir.2005) (*citing United States v. Copple*, 24 F.3d 535, 544 (3d Cir.1994); *United States v. Pearlstein*, 576 F.2d 531, 534 (3d Cir.1978)). Therefore, Mr. Newmark's motion must be denied if the Court determines that the Government produced "substantial evidence" that Mr. Newmark either knowingly devised or participated in the charged scheme, and had the specific intent to defraud the Walkers.

Mr. Newmark argues that the Government did not produce sufficient evidence to prove his culpable participation in the charged scheme to defraud the Walkers. Tacitly acknowledging that the Newmark-Morgan Stanley communications are at least problematic for his position, Mr. Newmark argues that proof that he misrepresented himself to Morgan Stanley is not equivalent to proof that he defrauded the Walkers.

As an initial, not insignificant, matter, the Court notes that it is undisputed that Mr. Newmark had no direct contact with either Thomas or Arthur Walker. The Government did not produce any evidence

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$1,000,000 or imprisoned not more than 30 years, or both.

indicating that Mr. Newmark was ever in the physical presence of either of the Walkers during the time frame of the alleged scheme, or that Mr. Newmark ever communicated directly with either of the Walkers, either in person, over the telephone, or in any other manner. No evidence was presented that Mr. Newmark misrepresented himself to the Walkers as an attorney in order to sell annuities to them. Instead, at trial the Government relied on a two-pronged theory implicating Mr. Newmark's "culpable participation" in the charged scheme to defraud the Walkers. First, the Government argued that Mr. Newmark "devised" the scheme that was carried out by Ms. Lawson, Mr. Wight and others. Secondly, the Government argued that Mr. Newmark's own actions, specifically, his interactions with Morgan Stanley, support the finding that he "participated" in the scheme to defraud the Walkers.

Based on the evidence presented, the Government's theory is that Mr. Newmark "devised" an alleged scheme whereby employees of his various companies, including Mr. Wight, would approach elderly target victims and attempt to sell them estate planning products and services (which would be procured through attorney Barry Bohmueller) as well as high-priced insurance products (the sales of which would be brokered by Mr. Newmark or Mr. Wight) by falsely misrepresenting themselves or himself as an attorney. To pursue that theory, the Government presented the following evidence at trial:

*8 • Thomas Walker testified that neither Ms. Lawson nor Mr. Wight ever identified themselves to the Walkers, in documents or otherwise, as

employees of BEN Consulting, EPA, or FFS.[11] Thomas Walker testified that Victoria Larson told the Walkers that she worked for Barry Bohmueller. (Trial Tr. vol. 2, 120:15-16, Oct. 16, 2007.) In addition, Mr. Walker testified that during an unspecified meeting with Mr. Wight, Mr. Wight told Thomas and Arthur Walker that he (Mr. Wight) was an attorney. (Trial Tr. vol. 2, 129:12-16, Oct. 16, 2007.)

· The Government presented numerous documents

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[11] Mr. Wight disputed this contention when he testified during the defense case. Mr. Wight testified that prior to meeting the Walkers for the first time, he called them to arrange his delivery of the estate planning documents. (Trial Tr. vol. 5, 13:13-20, Oct. 19, 2007) He stated that he first spoke to Arthur Walker, and informed him that he was a notary for Mr. Bohmueller and was coming to deliver and notarize the Walkers' trusts. (Trial Tr. vol. 5, 13:23-25, Oct. 19, 2007.) In addition, Mr. Wight testified that "as an employee of Funding and Financial Services, I was there to do the free financial consultation that they had requested, and to fund their trust." (Trial Tr. vol. 5, 14:1-3, Oct. 19, 2007.)

Mr. Wight also testified that during his July 20, 2001 meeting with the Walkers, after the Walkers had finished executing the various estate planning documents that Mr. Wight had delivered, he stated "Okay. We're all clear. The Bohmueller work is done. Now I'm wearing the Funding and Financial Services hat." (Trial Tr. vol. 5, 25:10-13, Oct. 19, 2007.) In addition, during cross-examination by Mr. Newmark's counsel, Mr. Wight testified that EPA became the successor company to FFS, and that EPA changed offices at some point in 2002. (Trial Tr. vol. 5, 101:4-6; 101:11-17, Oct. 19, 2007.) Mr. Wight testified that following EPA's move, it sent a letter to all of its clients informing them of the change of address. (Trial Tr. vol. 5, 101:18-21; 102:4-6, Oct. 19, 2007.) Counsel pointed to a letter from EPA addressed to Mr. Arthur Walker, dated September 27, 2002, notifying him of the change of address and enclosing two EPA business cards. (Trial Tr. vol. 5, 102:13-103:3, Oct. 19, 2007.)

that the Walkers signed on June 27, 2001 during Ms. Larson's visit, including an engagement letter, and a statement confirming that Mr. Bohmueller's office would prepare certain estate planning documents for the Walkers. These documents either displayed Mr. Bohmueller's letterhead or included his name, and the engagement letter included Mr. Bohmueller's typed facsimile signature. None of these documents contained or referenced Mr. Newmark's name, or the name of any of the companies he operated. (Gov't Trial Exs. 2-3, 5-6, 7A-B, 8A-B.)

- The Government also presented checks that each of the Walker brothers had signed, dated June 27, 2001, made out to "Bohmueller Law Office" in the amount of $1650.00.[12] (Gov't Trial Exs. 4A-B.) The Walkers gave these checks to Ms. Larson on that date.

- Two of the Walkers' neighbors - Murray and Gertrude Fisk - testified that on June 20, 2001, they witnessed the Walkers' signing various estate planning documents that Mr. Wight had delivered to the Walker home. (Trial Tr. vol. 2, 47:17-49:23; 81:21-82:9, Oct. 16, 2007.) The Fisks testified that on that day, in Mr. Wight's presence, one of the

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[12] The defense notes that on June 27, 2001 both Walkers also signed a "Consultation Request Form," in which the Walkers ostensibly requested Mr. Bohmueller to arrange a "free, no-obligation consultation with a financial services representative who is also a licensed insurance agent." (Gov't Trial Ex. 9A.) This form stated that the requested "consultation" would occur "[a]t the time of delivery of your Personal Estate Planning Package ." (Gov't Trial Ex. 9A.)

Walkers introduced Mr. Wight as their attorney. (Trial Tr. vol. 2, 47:17-49:23; 81:21-23; 95:8-9, 20-21, Oct. 16, 2007.) At that time, Mr. Wight did not correct that misstatement. (Gov't Trial Ex. 123, J. Wight Dep. Excerpt No. 26 at 1-2, Jan. 20, 2004.)

- During one of Mr. Wight's visits to the Walkers' home, Mr. Wight gave the Walkers a business card from attorney Barry Bohmueller's office. Mr. Wight had written his name and telephone number on the front of the card. (Gov't Trial Ex. 1; Trial Tr. vol. 2, 128:7-11, Oct. 16, 2007.) [13]

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[13] During trial, the Government's counsel questioned Thomas Walker about this Bohmueller business card on which John Wight had written his name and telephone number. (*See generally* Trial Tr. vol. 2, 128:7-11, Oct. 16, 2007.) Counsel's questions were asked in the context of Mr. Wight's initial visit to the Walkers' home, implying that Mr. Wight had given this card to the Walkers upon first meeting them. However, Mr. Walker never testified as to when Mr. Wight actually gave the Bohmueller business card to him and his brother, or even that Mr. Wight gave it to them during his first visit to the Walkers' home. Mr. Walker testified simply that Mr. Wight had given them the Bohmueller business card.

In fact, the deposition excerpts that Mr. Lightman read to the jury included a statement by Mr. Wight that he did not give the Bohmueller business card to the Walkers during one of the initial meetings, (Gov't Trial Ex. 123, J. Wight Dep. Excerpt No. 27 at 1), or prior to his first meeting with the Walkers on July 20, 2001, on which date the Fisks witnessed the Walkers sign their trust documents. (Gov't Trial Ex. 123, J. Wight Dep. Excerpt No. 26 at 2.) Mr. Wight later admitted that he had written his name and telephone number on the Bohmueller business card, but explained in detail that he done this after the Walkers had received their trust documents back from Morgan Stanley. (Gov't Trial Ex. 123, J. Wight Dep. Excerpt No. 27 at 1-2.) Morgan Stanley's Perry Rose had taken the Walkers' trust books with him when he left the Walkers' home on or around August 21, 2001, and had returned the trust

- The Government presented four "Tax Deductible Annuity Application and Agreements" that the Walkers had executed on August 3, 2001. (Gov't Trial Exs. 13-14, 17-18.) These agreements were also signed by Mr. Newmark on August 3, 2001, and by a representative of NCF on August 13, 2001. By signing these agreements, Mr. Newmark certified that he witnessed the Walkers sign the agreements in his presence. However, it is undisputed that Mr. Newmark never met the Walkers during the pendency of the annuity transactions, so he could not have, in fact, witnessed the Walkers's signatures as his signature certifies.

As evidence of Mr. Newmark's supposed direct involvement in the scheme, the Government also introduced the following evidence:

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books to the Walkers at a later date. During his deposition, Mr. Wight stated that when Morgan Stanley returned the trust books to the Walkers, Mr. Bohmueller's business card was not included in the inside front pocket, where it was supposed to be. Mr. Wight stated that he "replaced the [Bohmueller business] cards and as further assurance that [the Walkers] would always be able to call me should there be any incident further with Morgan Stanley with respect to these trust books I was referring to, I put my name in big block letters and my 800 phone number." (Gov$7Dt Trial Ex. 123, J. Wight Dep. Excerpt No. 27 at 1.)

Therefore, the only evidence produced at trial tending to prove *when* Mr. Wight gave this business card to the Walkers is Mr. Wight's testimony that this event occurred weeks after the Walkers had executed the trusts and wills prepared by Mr. Bohmueller, and after they had already decided to purchase the New Life annuities and executed four purchase contracts towards that end.

*9 • Two undated letters, nominally from Arthur and Thomas Walker, respectively, but actually drafted and sent by Mr. Newmark, to Morgan Stanley's Scranton branch office complaining about Perry Rose's visit to the Walkers' home. (Gov't Trial Ex. 90 at 5, 7.)

• Two letters, dated August 29, 2001, again, nominally from Arthur and Thomas Walker, respectively, but actually drafted and sent by Mr. Newmark to Morgan Stanley's legal department authorizing and instructing Morgan Stanley to effectuate the transfer of the Walkers' funds to New Life. (Gov't Trial Ex. 90 at 4, 6.)

• A fax, dated August 30, 2001, nominally from the Walkers but, again, actually drafted and sent by Mr. Newmark, to Phillip J. Purcell, Morgan Stanley's Chief Executive Officer. This letter reads that "our attorney's office" had contacted Morgan Stanley regarding Morgan Stanley's delay in transferring the Walkers' funds to New Life. (Gov't Trial Ex. 90 at 3.)

• Mr. Zeyer's testimony that Mr. Newmark called Morgan Stanley's compliance department on August 31, 2001, to complain that Morgan Stanley was delaying the transfer of the Walkers' funds to New Life. (*See generally* Trial Tr. C. Zeyer, Oct. 17, 2007.) [14]

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[14] The Defendants requested an expedited transcript of Mr. Zeyer's testimony at trial, so that they could prepare their Rule 29(a) motions at the close of the Government's case. The court reporter complied and prepared a transcript of Mr. Zeyer's October 17, 2007 trial testimony. Mr. Zeyer's testimony is not included in volume three of the trial transcripts, which includes

- The "verbal complaint form" that Mr. Zeyer completed after speaking with Mr. Newmark over the telephone on August 31, 2001. On the form, Mr. Zeyer identified Mr. Newmark as "Attorney for Arthur and Thomas Walker," and referred to Mr. Newmark multiple times as "Attorney." (Gov't Trial Ex. 90 at 2.)

- A facsimile cover sheet, dated August 31, 2001, from Mr. Newmark to Mr. Zeyer at Morgan Stanley. The facsimile cover sheet purported to be from the "Bohmueller Law Offices" (those words were typed in large print on the top of the page). However, the cover sheet listed Mr. Newmark's telephone and fax numbers on the bottom of the page. In the "notes/comments" section of the facsimile cover sheet, Mr. Newmark had written some text to Mr. Zeyer and at the bottom of the cover sheet he typed his full name. (Gov't Trial Ex. 91.)

- Excerpts from Mr. Newmark's deposition in the civil suit, where Mr. Newmark testified that he "made up" the August 31, 2001 facsimile cover sheet. (Gov't Trial Ex. 123, B. Newmark Dep. Excerpt No. 22 at 4, Jan. 21, 2004.)

Certainly, this evidence is susceptible to competing inferences. On one hand, the evidence permits the inference that Mr. Newmark devised a business plan that, perhaps sleazy, appears to be legal. Following

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the remainder of the trial proceedings held on October 17. The volume containing only Mr. Zeyer's testimony is referred to as "Trial Tr. C. Zeyer."

this inference, Mr. Newmark and his associates devised a plan to piggy-back sales of insurance products on estate planning services provided by attorney Bohmueller. Mr. Newmark actively marketed these services to individuals over 60 years' old with some financial means. Mr. Newmark's employees would advertise and market Mr. Bohmueller's products in order to meet and gain the trust of potential customers. During this part of the process, Mr. Newmark's employees, such as Mr. Wight, acted as delivery agents for Mr. Bohmueller. Indeed, Mr. Wight would deliver to the customers the various estate planning documents drafted by Mr. Bohmuller, and be available to explain the documents to the customers, as well as ensure that they signed them. Once the customers executed the various estate planning documents, Mr. Wight would remove his "agent-for-Mr. Bohmueller hat" and put on his "insurance salesman hat." Thereafter, Mr. Wight, in his role as an insurance agent, would attempt to sell insurance products to the customers who had just purchased estate planning services. In order to ensure at least the appearance that customers understood Mr. Wight's dual role, customers, like the Walkers, would sign several documents confirming that they understood the difference between the estate planning services offered by Mr. Bohmueller, and the financial consultation offered by Mr. Wight. Absent any overt misrepresentations, this "business plan" does not appear to be fraudulent.

*10 On the other hand, the evidence also permits the inference that Mr. Newmark designed a scheme to confuse and deceive elderly people into believing that Ms. Larson and Mr. Wight were attorneys, or at

least actually part, i.e., "in the employ" of Mr. Bohmueller's law practice. This scheme involved using "made up" letterhead, Mr. Wight's "lies" about being an attorney and generally creating the impression that all of the services were being sanctioned or sponsored, if not actually offered, by a law firm. Mr. Newmark's employees or agents used the Bohmueller name to get in the door, and once they had gained the confidence of a potential customer, they attempted to sell those customers insurance products.

Thomas Walker testified that he and his brother previously had utilized the services of a lawyer to draft their wills. It is not unreasonable to expect that the Walkers, or other people, would have expected the person who delivers lengthy, complicated trust documents, and then explains those documents to them and answers their questions for an hour before having them sign the documents, to be a lawyer. In this case, Mr. Wight, a non-lawyer, explained complex legal trust documents to the Walkers, and then attempted to sell them financial products to fund the very trust that had just been established.

Somewhat less susceptible to competing interpretations, there is substantial evidence that Mr. Newmark "participated" in the scheme by convincing Morgan Stanley that he was the Walkers' attorney in order to persuade Morgan Stanley to transfer the Walkers' funds to New Life to consummate the purchase of the annuities. This is the second prong of the Government's theory. Essentially, the Government argues that Mr. Newmark's duplicitous dealings with Morgan Stanley are evidence that he actively participated in

the scheme to defraud the Walkers, and secondly, that those activities provide circumstantial evidence that Mr. Newmark devised the scheme to defraud the Walkers because the misrepresentation at issue - the lie about being an attorney or in the employ of an attorney - was the same. In its brief, the Government argues that "it was no accident that Mr. Wight and Mr. Newmark both lied about being attorneys, but was instead part of a pre-meditated scheme to defraud" the Walkers. (Gov't Mem. Opp'n 13.)

Mr. Newmark has a heavy burden as the Court must review the evidence in the light most favorable to the Government, *McKee*, 506 F.3d at 232, and must sustain the verdict " 'if a rational trier of fact could have found [the] defendant guilty beyond a reasonable doubt, and the verdict is supported by substantial evidence.'" *Id.* (*quoting Coyle*, 63 F.3d at 1243.

While the evidence that Mr. Newmark "devised" or "participated" in a scheme to defraud the Walkers is not overwhelming, the Court concludes that the evidence is sufficiently inter-connected and substantial that a rational jury could find beyond a reasonable doubt that Mr. Newmark participated in a scheme to defraud the Walkers. Certainly, the Government produced little evidence that provides any nexus between Mr. Newmark and "the scheme" up to the point in time of when Mr. Newmark's various and varied direct and indirect (e.g., the ghost-written documents "from" the Walkers) contacts with Morgan Stanley came to the fore. However, Mr. Newmark's direct and personal participation and methodology in attempting to persuade Morgan Stanley to transfer the Walkers'

funds to New Life is without question. Of course, the defense disputes that Mr. Newmark actually affirmatively misrepresented himself as an attorney for the Walkers during his August 31, 2001 telephone conversation with Mr. Zeyer, but cannot muster any similar contest as to the documentary evidence. Moreover, the fact that Mr. Newmark played a key role in persuading Morgan Stanley to transfer the Walkers' funds to New Life is incontrovertible.

*11 When Perry Rose arrived at the Walkers' home in Tunkhannock, and the New Life annuity transactions appeared to be jeopardized, Mr. Newmark sprung into action in order to save the transactions (and his potential commission). He dispatched Mr. Wight to the Walkers' home along with a portable fax machine, and "ghostwrote" numerous letters to various people at Morgan Stanley, which the Walkers signed. These letters complained about Morgan Stanley's representatives' "harassment" and threatened to take action if Morgan Stanley attempted to contact the Walkers again.[15] Mr. Newmark also sent a fax to Morgan Stanley's CEO, nominally from the Walkers, falsely stating that the Walkers' "attorney's office" had complained to Morgan Stanley about its delaying the transfer of the Walkers' funds. When these actions

[15] One pair of letters, addressed to Morgan Stanley's compliance department, states that if the Walkers are contacted by any other representatives of Morgan Stanley, the Walkers will "contact the [National Association of Securities Dealers] and the [U.S. Securities and Exchange Commission]." (Gov't Trial Ex. 90 at 5,7.) These letters further state: "Please take this letter seriously, I will not hesitate to take further actions if I am contacted again." (Gov't Trial Ex. 90 at 5,7.)

still failed to force Morgan Stanley to transfer the Walkers' funds to New Life, Mr. Newmark called Morgan Stanley directly, and sent Morgan Stanley correspondence under false pretenses, namely, the fax cover sheet bearing the name "Bohmueller Law Offices," which Mr. Newmark admitted he had "made up."

A rational jury could conclude, based on the evidence that Mr. Newmark "foster[ed] the false impression" that he was an attorney, and that Mr. Newmark's actions were part of a larger scheme to defraud the Walkers. Therefore, at the Rule 29(a) stage, considering Mr. Newmark's motion on the basis of the evidence that had been presented when the Government rested its case-in-chief, Mr. Newmark's motion on these grounds will be denied.[16]

The Court will also deny Mr. Newmark's renewed Rule 29 challenge to Count One considering all evidence presented at the close of the entire case,

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[16] However, as the Court will explain below, while the Court finds the Government's proof that Mr. Newmark participated in a "scheme" to defraud the Walkers to be sufficient, the Court also finds that Mr. Newmark's December 16, 2003 mailing of answers to interrogatories two and a half years later was not "in furtherance" of that scheme. A component of the Court's ruling on Count Three is that the Government's evidence was insufficient to prove that Mr. Newmark's December 16, 2003 mailing was incident to the rest of the charged scheme, which appeared to conclude in late 2001 after the Walkers purchased the New Life annuities. A judgment of acquittal will be entered for Mr. Newmark as to Count Three on that basis. For purposes of Count One, however, for the reasons provided above, the Court finds that the Government produced sufficient evidence upon which the jury could have found Mr. Newmark guilty of the wire fraud charge.

and after the jury reached its verdict. The evidence presented by the defense had very little bearing on Mr. Newmark's interactions with Morgan Stanley, which, as discussed above, was a major component of the Government's case on this Count.

At trial, Mr. Wight testified at length about his interactions with the Walkers and with Mr. Newmark. Mr. Wight testified that prior to meeting the Walkers, he had never sold a charitable gift annuity to any other client. (Oct. 19, 2007 Trial Tr. 10:19-21.) He testified that after he had gained an understanding of the Walkers' estate planning objectives, and understood that the Walkers wanted to give away their entire estate, he discussed the Walkers' investment options with Mr. Newmark on numerous occasions. He testified that Mr. Newmark "did an awful lot of research" regarding the Walkers' investment options, and that Mr. Newmark suggested selling the Walkers a New Life charitable gift annuity. This evidence tends to show that Mr. Newmark was intricately involved with the decision-making process that ultimately led to the Walkers' parting with approximately $3.5 million. Mr. Newmark chose the particular investment vehicle, made all the arrangements with New Life, and prepared some of the paperwork that was necessary to purchase the annuities.[17] Moreover, Mr. Newmark was involved in the decision to recommend that the

[17] The cover sheet of certain paperwork accompanying the Tax Deductible Annuity Application and Agreements that the Walkers signed, which illustrates the mechanics of the charitable gift annuities that the Walkers purchased, reads: "A Service Provided By, Brian Newmark, National Community Foundation," and lists NCF's Bentwood, TN address. (Gov't Trial Exs. 13-14, 17-18.)

Walkers make an enormous charitable donation, and that they spend all of their liquid assets, a sum exceeding $3.5 million, to purchase those annuities.[18] Mr. Wight's testimony, plus all of the evidence produced by the Government that is discussed above, is sufficient to sustain the jury's guilty verdict with respect to Count One.

C. Count Three - Whether the Mailing was "In Furtherance" of a "Scheme to Defraud" the Walkers

*12 The Indictment charged Mr. Newmark with one count of mail fraud based on the December 16, 2003 mailing, through his attorney, of answers to interrogatories in civil litigation initiated by the Walkers against Mr. Newmark and others two years after the Walkers purchased the annuities from New Life. The Indictment describes the "scheme" as follows:

> From on or about June 27, 2001 through on or about January 21, 2004, defendants **BRIAN J. NEWMARK and JOHN N. WIGHT** knowingly devised and intended to devise a scheme to defraud [the Walkers], and to obtain money and property from [the Walkers] by means of false and fraudulent pretenses, representations and promises.

(Indictment at 2 ¶ 7.) The "money and property" in

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[18] As the Government's expert testified at trial, it is exceedingly rare for individuals in their 80's to purchase such expensive annuities because those individuals likely will not receive the full benefit of a continuous, monthly income stream for a set period of time into the future, which is a primary benefit of purchasing an annuity. (Trial Tr. vol. 4, 126:15-127:16, Oct. 18.2007.)

question was approximately $3.5 million that the Walkers were persuaded to invest in charitable gift annuities. The Walkers purchased these annuities from New Life Corporation. The "fraudulent misrepresentation" charged was that Mr. Newmark, Mr. Wight and others falsely held themselves out as attorneys for the Walkers.

The Indictment further alleges that as "part of the scheme,"

> During litigation in federal court in the Eastern District of Pennsylvania with [the Walkers] arising from the events charged here, defendant **BRIAN J. NEWMARK** falsely denied holding himself out as an attorney for [the Walkers], in response to Plaintiff's First Set of Interrogatories, served by mail on December 16, 2003.

(Indictment at 4 ¶ 8.K.) The Indictment charges that on December 16, 2003, Mr. Newmark mailed these answers to interrogatories "for the purpose of executing" the scheme described in the Indictment. (Indictment at 6 ¶ 2.)

Mr. Newmark argues that this December 16, 2003 mailing of the interrogatory answers was not made, as a matter of law, "for the purpose of executing," or "in furtherance" of, the alleged scheme. To evaluate this argument the Court must consider what is the reasonable or realistic "life" of the "scheme." The trial evidence of the chronology in this case was essentially not disputed. The Walkers invested in the New Life annuities in late 2001, and Mr. Newmark and Mr. Wight received their commissions resulting from those transactions during that same time period. Mr. Wight made several follow-up visits to the Walkers' Pennsylvania and Florida homes

during 2002, related to servicing the annuities, i.e., ensuring that the Walkers received a regular, monthly stream of payments. The Government did not offer any evidence, through testimony or otherwise, that Mr. Wight (or anyone else employed by or associated with Mr. Newmark) or Mr. Newmark himself attempted to sell any other financial products to the Walkers after the initial annuity transactions were completed in the fall of 2001.

The Walkers initiated their civil suit against Mr. Newmark and others in June 2003. Six months later, on December 16, 2003, after discovery in the civil action had commenced, Mr. Newmark's attorney mailed the interrogatory answers in question. Mr. Newmark argues that this mailing, which occurred more than two years after the object of a scheme, i.e., the late 2001 consummation of the annuity transactions, had been accomplished, was not "for the purpose of executing" the scheme.

1. *The Mail Fraud Statute*

*13 In order to prove mail fraud under 18 U.S.C. § 1341, the Government needed to prove that Mr. Newmark devised or participated in a scheme to defraud and that the mailings charged in the Indictment were made "for the purpose of executing such scheme."18 U.S.C. § 1341; *Parr v. United States*, 363 U.S. 370, 385, 80 S.Ct. 1171, 4 L.Ed.2d 1277 (1960). As a general matter, the Supreme Court stated that "[t]he federal mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use of the mails is a part of the execution of the fraud, leaving all other cases to

be dealt with by appropriate state law." *Kann v. United States*, 323 U.S. 88, 95, 65 S.Ct. 148, 89 L.Ed. 88 (1944). Moreover, the mail fraud statute does not reach every mailing that is the by-product of a scheme to defraud, as it only pertains to mailings "for the purpose of executing" a scheme to obtain money or property.

The Court of Appeals for the Third Circuit analyzed the phrase "for the purposes of executing the scheme," in the context of the mail fraud statute as follows:

> Whether a mailing is "for the purpose of executing a scheme" within the meaning of § 1341 depends upon whether it is "sufficiently closely related to respondent's scheme to bring his conduct within the statute."The completion of the scheme must depend in some way on the mailings charged. However, "[i]t is not necessary that the scheme contemplate the use of the mails as an essential element."Rather, it is sufficient if the mailing is "incident to an essential part of the scheme."

United States v. Lebovitz, 669 F.2d 894, 896 (3d Cir.1982) (citations omitted); *accord United States v. Cross*, 128 F.3d 145, 150 (3d Cir.1997); *United States v. Ruuska*, 883 F.2d 262, 264 (3d Cir.1989); *United States v. Otto*, 742 F.2d 104, 108 (3d Cir.1984). "The relevant question at all times is whether the mailing is part of the execution of the scheme as conceived by the perpetrator at the time, regardless of whether the mailing later, through hindsight, may prove to have been counterproductive and return to haunt the perpetrator of the fraud." *Schmuck v. United States*, 489 U.S. 705, 715, 109 S.Ct. 1443, 103 L.Ed.2d 734 (1989).

Generally, a mailing sent after the object of a scheme has been accomplished is not sufficiently closely related to the scheme to support a mail fraud conviction. *Lebovitz*, 669 F.2d at 896. "However, the object of a scheme is not necessarily accomplished at the moment when the perpetrator of the scheme receives the fruits of the scheme." *Id.* Subsequent mailings may be "for the purpose of executing" the scheme if they were, for example, "designed to lull the victims into a false sense of security, postpone their ultimate complaint to the authorities, and therefore make the apprehension of the defendants less likely than if no mailings had taken place." *United States v. Lane*, 474 U.S. 438, 451-53, 106 S.Ct. 725, 88 L.Ed.2d 814 (1986) (*quoting United States v. Maze*, 414 U.S. 395, 403, 94 S.Ct. 645, 38 L.Ed.2d 603 (1974)); *accord Tabas v. Tabas*, 47 F.3d 1280, 1295 n. 18 (3d Cir.1995); *Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406, 1416 n. 3 (3d Cir.1991)).

*14 In a seminal case, the United States Supreme Court rejected the "automatic rule that a deliberate, planned use of the mails after the victims' money had been obtained can never be 'for the purpose of executing' the defendants' scheme." *United States v. Sampson*, 371 U.S. 75, 80, 83 S.Ct. 173, 9 L.Ed.2d 136 (1962). The defendants in *Sampson* were employees of a large corporation who purported to be able to help businessmen obtain loans or sell their businesses. *Id.* at 77.As part of the scheme, the defendants would call prospects and urge them by false representations to sign applications asking the defendants to obtain loans or sell their businesses. The defendant salesmen would urge prospects to remit an "advanced fee," which the defendants

converted into cashiers checks, and then deposited in banks. *After* the money had been obtained from the victims, the defendants' scheme, as charged in the indictment, called for a "mailing of the accepted application together with a form letter to the victims 'for the purpose of lulling said victims by representing that their applications had been accepted and that the defendants would therefore perform for said victims" the agreed-upon services. *Id.* at 78.

The mailing at issue in *Sampson* was akin to a receipt or confirmation of payment from the victims. The district court had dismissed the indictment reasoning that because the mailings came after the money had already been obtained from the victims, the mailings could not have been "for the purpose of executing" the scheme. *Id.* at 79. The Supreme Court disagreed and reversed. Because the case was decided in the context of a motion to dismiss an indictment, the Supreme Court examined only the indictment itself. The Supreme Court noted that the indictment alleged that the scheme, as devised by the defendants and as actually carried out, involved acts both before and after the money changed hands. Furthermore, the indictment specifically alleged that the acceptance letters were mailed to the victims "for the purpose of lulling them by assurances that the promised services would be performed." *Id.* at 81.

The Supreme Court distinguished its previous cases, namely, *Kann v. United States*, 323 U.S. 88, 95, 65 S.Ct. 148, 89 L.Ed. 88 (1944), and *Parr v. United States*, 363 U.S. 370, 80 S.Ct. 1171, 4 L.Ed.2d 1277

(1960),[19] which involved schemes that "had been fully executed before the mails were used," *Sampson*, 371 U.S. at 80, such that the mailing at issue was not "for the purpose of executing" the scheme. By contrast, the scheme in *Sampson* "contemplated from the start the commission of fraudulent activities which were to be and actually were carried out both before and after the money was obtained from the victims." *Id.* The Supreme Court refused to foreclose the possibility that evidence at trial could prove that premeditated acts committed after the victims relinquished their money could be "for the purpose of executing" the scheme.

In *Sampson*, the Supreme Court did not explain why using the mails to "lull" victims after the victims had

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[19] In *Kann*, the defendants fraudulently obtained checks payable to them from their employer, which they then cashed or deposited at a bank. The use of the mails as charged was the mailing of the checks for collection by the banks that cashed them from the banks upon which they were drawn. The Supreme Court held that these mailings were not "in furtherance" of the scheme. Because the defendants had already obtained the money and their scheme had come to fruition before the mailings occurred, the Supreme Court held that the mailings were immaterial to the consummation of the defendants' scheme; the checks were mailed for the banks' own purposes and not in any way for furthering the scheme.

In *Parr*, the defendants obtained gasoline and other products for themselves using a credit card of a school district which had authorized use of the card for the district's purposes only. The mailings at issue were two invoices mailed by an oil company to the school district, and the check mailed back in payment. Again, the Supreme Court found that the mailings - by "outsiders" - were not an integral part of the scheme as planned and executed by the defendants, and that it was completely immaterial to the defendants how the oil company collected on its bill.

already parted with their money was "for the purpose of executing" a scheme to obtain that money. Nor did the Court state when, under such circumstances, the scheme would be fully executed so that subsequent uses of the mails would no longer be "for the purpose of executing" a scheme. The Supreme Court appeared to find it important that the mailings were intended to "make the victims believe that the defendants had faithfully performed and would continue to perform the promised services." *Id.* at 78.

*15 In subsequent cases, the Supreme Court has expounded upon the rationale underlying the "lulling" theory of liability under the mail fraud statute. In *Maze,* the Supreme Court focused on whether the mailing at issue was integral to the success of the defendant's scheme. The defendant stole his roommate's credit card and used it to pay for food and several motel rooms, signing his roommate's name upon checking out of each motel. The mailings at issue concerned invoices representing the goods and services furnished to the defendant, which each of the motels mailed to the bank that issued the credit card. The indictment charged the defendant with a scheme to defraud the bank, the roommate, and the several motels, by unlawfully obtaining possession of the credit card, and using the card to purchase the products and services. The indictment charged that the defendant knew that each merchant would cause the sales slip of the purchases to be delivered by mail to the issuer bank which would in turn mail them to the roommate for payment, *Maze,* 414 U.S. at 396-97, and knew that the delay in this mailing would enable the defendant to continue purchasing goods

and services for an appreciable period of time, *id.* at 397.

The Court held that the scheme in *Maze* came to fruition when the defendant checked out of each motel. Therefore, each of the mailings, all of which occurred *after* the defendant had engaged in each fraudulent transaction, were not "in furtherance" of the scheme. The Supreme Court stated that "there is no indication that the success of [the defendant's] scheme depended in any way on which of his victims bore the loss," noting that the motel proprietors, the issuing bank, and the roommate were all victims "to a greater or lesser degree." *Id.* at 402. Thus, the hotel proprietors' respective mailings after the defendant checked out of each hotel were immaterial to the success of the scheme, and were, therefore, not "in furtherance" of the scheme.[20]

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[20] In *Schmuck*, the Supreme Court again focused on whether the mailing was integral to the success of the scheme. 489 U.S. at 712. The defendant in *Schmuck* was charged with devising and executing a "fairly large-scale" scheme to defraud Wisconsin retail automobile customers who based their decisions to purchase certain automobiles at least in part on the low-mileage readings on the tampered odometers. *Id.* at 711.Schmuck, the defendant, employed a man who turned back the odometers on approximately 150 different cars, and Schmuck then marketed the cars to a number of dealers, several of whom he regularly dealt with over a 15-year period. *Id.* To complete the resale of each automobile, the dealer who purchased it from Schmuck would submit a title-application form to the Wisconsin Department of Transportation on behalf of his retail customer. *Id.* at 707. The receipt of a Wisconsin title was a prerequisite for completing the resale; without it, the dealer could not transfer title to the customer and the customer could not obtain Wisconsin tags. *Id.* The submission of the title-application form supplied the mailing element of each of the alleged mail frauds. *Id.*

The *Maze* Court rejected the Government's arguments in reliance upon *Sampson*, that the delay caused by the use of the mails was essential to the success of the "scheme" in that it aided the perpetrator and postponed detection. *Id.* at 402.[21] The Supreme Court distinguished *Sampson*, reiterating that in *Sampson* the mailings were designed to "lull the victims into a false sense of security, postpone their ultimate complaint to the authorities, and therefore make the apprehension of the defendants less likely than if no mailings had taken place." *Id.* at 403. By contrast, the successful completion of the mailings in *Maze* would have increased the probability that the defendant would be detected and apprehended. *Id.*

The Supreme Court noted that Schmuck's scheme "was not a 'one-shot' operation in which he sold a single car to an isolated dealer." *Id.* at 711.Instead, it was "an ongoing fraudulent venture," from which "[a] rational jury could have concluded that the success of Schmuck's venture depended upon his continued harmonious relations with, and good reputation among, retail dealers, which in turn required the smooth flow of cars from the dealers to their Wisconsin customers." *Id.* at 711-12. The Court upheld the mail fraud convictions. It acknowledged that "although the registration-form mailings may not have contributed directly to the duping of either the retail dealers or the customers, they were necessary to the passage of title, which in turn was essential to the perpetuation of Schmuck's scheme." *Id.* at 712. In so holding, the Supreme Court affirmed its earlier rulings that even "innocent" mailings, i.e., ones that contain no false information, may support a mail fraud conviction. *Id.* at 714-15 (*citing Parr*, 363 U.S. at 390).

[21] The Supreme Court also noted that the delay was not "caused by" the use of the mails, but was caused by the distance between the sender of the mail and the recipient, in addition to the billing system of the issuing bank. *Maze*, 414 U.S. at 403 & n. 8.

The Third Circuit Court of Appeals also has had ample opportunity to analyze the phrase "for the purpose of executing the scheme" in the mail fraud context. In *Lebovitz,* the court of appeals affirmed a mail fraud conviction where Lebovitz, an attorney, initiated litigation and presented false claims on behalf of his clients for medical payments and personal injuries resulting from an auto accident. After a jury convicted him, Lebovitz challenged his mail fraud convictions with respect to three mailings related to third-party claims asserted by the original defendants to the lawsuit initiated by Lebovitz's clients. Lebovitz argued that the joinder of, and recovery of money from, an additional defendant was not part of the "scheme," which, he argued, only involved defrauding the "original" defendants, and that the subject mailings lacked a sufficient nexus to the scheme to bring them within the ambit of the mail fraud statute. The court of appeals disagreed, finding that the mailings at issue were sufficiently related to the alleged scheme to support a conviction for mail fraud. *Lebovitz,* 669 F.2d at 899. The court noted that Lebovitz had negotiated and processed the settlement of the "original" claims with the third-party claims at the same time, and that during settlement negotiations Lebovitz asserted damages claims based on the same inflated bills at issue in the "original" claims.[22]

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[22] Lebovitz had challenged an additional mailing related to a separate accident. Lebovitz represented a driver and a passenger in the accident in an action against another driver. Lebovitz's clients were insured by Nationwide, and Lebovitz sought recovery from Nationwide for his clients' medical expenses based on fraudulently inflated medical bills. The medical payment claim was paid on December 16, 1974.

*16 By contrast, in *United States v. Tarnopol*, 561 F.2d 466, 472 (3d Cir.1977), the court of appeals reversed defendants' conviction for mail fraud, holding that "routine business" mailings that took place after the object of the scheme had been accomplished were not sufficiently closely related to the scheme to support a mail fraud prosecution. The defendants were executives of certain record companies, and the "scheme" involved sales of records, which the record companies did not record on their books. The defendants used the proceeds of the sales to make improper payments to third parties, such as disc jockes and program directors of radio stations, to secure favored treatment of the defendants' companies' recordings. In addition, the government argued that the defendants used these

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Lebovitz represented the same clients in a personal injury suit, and in that suit, the defendant asserted third-party claims against one of Lebovitz's clients. Nationwide, not Lebovitz, defended those claims. The mailing at issue was an August 18, 1976 letter from Nationwide's trial attorney to Nationwide's claims attorney enclosing, among other things, the fraudulently inflated medical bills. The court of appeals sustained the conviction in this count as well. Rejecting Lebovitz's argument that the "scheme" concluded when he received payment in December 1974, the court noted that Lebovitz continued to represent these clients when the letter at issue was sent, and their personal injury claims relied in part upon the fraudulently inflated medical bills. The court pointed to Lebovitz's own testimony, and a letter he sent to Nationwide in October 1977, showing that he was still attempting to get Nationwide to pay more money to his clients well into 1977. The court held that it could not state, as a matter of law, that the August 1976 mailing was not incident to an essential part of the scheme, which the jury could have viewed as a settlement of all of the claims of Lebovitz's clients. *Lebovitz*, 699 F.2d at 899.

unrecorded transactions to defraud the United States for tax purposes. The mailings at issue were packing slips mailed by the shipping company to the recipient (defendant) companies listing the records shipped at the direction of the recipient companies. The court noted that this was a routine business procedure that was followed in the case of all sales, whether or not they were involved in the scheme to defraud. *Id.* at 472.The court held that these mailings were too remote from the scheme to be regarded as furthering it. The mailings occurred before the first action was taken to execute the fraud, were initiated by the shipping company - not the defendants' companies - and were "perfectly proper routine procedure in aid of the conduct of business" between the shipping company and the defendants' companies. *Id.* at 473.

In yet another case, *United States v. Otto*, 742 F.2d 104 (3d Cir.1984), the court of appeals again considered the role of mailings vis-à-vis the scheme to defraud. *Otto* involved a scheme in which the defendant, Otto, induced investors to entrust him with funds to trade in stock options. Otto gave each victim a promissory note for the principal amount plus a guaranteed return on investment. When the notes came due, Otto persuaded the victims to "roll over" the investment into a new one, to invest additional funds, or invest in new opportunities. Otto often used funds received from one investor to cover other investors' notes that had come due. In 1978, several investors demanded payment of monies due and in September one investor, Ging, retained a lawyer to bring suit. Otto contacted Ging and informed him that the business was doing well. In the letter that formed the basis of count one of the

indictment, Otto promised to pay Ging monies owed to him on a specific schedule. However, Otto was unable to meet the schedule, and engaged Ging in further negotiations. Ging sent Otto another letter, which formed count five, setting out the terms of a revised settlement agreement. Then, in May 1979, another investor, Houston, expecting to receive a check from Otto for $30,000, instead received a check for $7,000. Houston contacted Otto, who advised her not to cash the check. Nevertheless, Houston attempted to cash the check, and when the bank would not honor it, she sent a letter to Otto requesting that he make the proper arrangements with the bank so that the check would be paid. This letter formed the basis for count six of the indictment against Otto.

*17 The court of appeals upheld the convictions based on counts one and five, but reversed the conviction as to count six. The court reasoned that the count one letter was sent while Otto was soliciting and obtaining further investments, and was sent after he became aware that Ging was considering the possibility of a lawsuit. The court noted that the jury could have found that the first Ging letter "was an attempt to buy time in order to avoid or at least postpone detection. A lawsuit with its attendant notoriety would alert potential victims to the defendant's duplicity, limit his sources for further funds, and bring the whole scheme crashing down on him." 742 F.2d at 108. With respect to the second Ging letter (count five), the court found that the letter was an integral part of negotiations, and that the letter may have been a tool to "mollify" the victim. *Id.* at 109.The court found that the jury could have concluded that the mailing was closely related

to the first Ging letter and incident to the scheme. *Id.* However, with respect to count six, the court distinguished the Houston letter from the two Ging letters, characterizing it as a "unilateral demand" that Otto honor the $7,000 check. The Court noted that Otto did not "directly or impliedly invite" the letter, and that its purpose was not to continue a relationship or arrange for a compromise. *Id.* The court analogized this letter to the one in *Tarnopol,* noting that both letters "tended to threaten the success of the fraudulent scheme rather than to further it." *Id.* (*citing Tarnopol,* 561 F.2d at 473). The court characterized the two Ging letters as "in the nature of a proposal to arrange a settlement and thus avoid a confrontation," while the Houston letter was a unilateral demand for payment. "The likely consequences of the two letters are sufficiently different so that Ging's letter can be considered as being in furtherance of the scheme, but the Houston letter fails that test." *Id.* at 109.

2. *Discussion*

Although there is no "automatic rule that a deliberate, planned use of the mails after the victims' money had been obtained can never be 'for the purpose of executing' the defendants' scheme," *Sampson,* 371 U.S. at 80, courts have routinely held that "a mailing sent after the object of a scheme has been accomplished is not sufficiently closely related to the scheme to support a mail fraud conviction." *Lebovitz,* 669 F.2d at 896. The one recognized exception to this rule is that "[m]ailings occurring after receipt of the goods obtained by fraud are within the statute," and may be considered to be "in furtherance" of the scheme, "if they 'were designed to

lull the victims into a false sense of security, postpone their ultimate complaint to the authorities, and therefore make the apprehension of the defendants less likely than if no mailings had taken place.'" *United States v. Lane*, 474 U.S. 438, 451-52, 106 S.Ct. 725, 88 L.Ed.2d 814 (1986) (*quoting Maze*, 414 U.S. at 403). Thus, the Court must deny Mr. Newmark's motion if the Court concludes *either* that Mr. Newmark's December 16, 2003 mailing of the interrogatory answer was "designed to lull" the Walkers, or that it was sent while the scheme was still ongoing, and was sent to "further" that scheme. The Court concludes the evidence produced by the Government at trial is insufficient to support either of these options.

*18 Mr. Newmark argues that this case does not involve the classic "check is in the mail" lulling scenario, and relies upon *Maze,* among other cases, in arguing that he did not use the mails as a means to induce a false sense of security, postpone victims' ultimate complaint to authorities or delay apprehension. *Maze,* 414 U.S. at 403. While Mr. Newmark acknowledges that *Maze* posits that this type of "lulling" can occur even after the scheme's fruition and be considered part of the scheme, *id.*, he argues that the mailing in question here was unrelated to any of these objectives.

The Government appears to concede that this case does not present the classic "lulling" scenario. However, the Government argues that, although the December 16, 2003 mailing was not meant to "lull" the Walkers, it was meant to further the objectives cited in *Maze,* namely, to make Mr. Newmark's apprehension less likely. The Government argues

that, as in *Sampson*, the "scheme" devised by Mr. Newmark contemplated from the start the commission of acts after the money changed hands. The "object" of the scheme, according to the Government, was not merely to "obtain" money from the Walkers but to *keep* it, and to keep the entire fraudulent enterprise a secret indefinitely. The Government argues that Mr. Newmark's scheme was not even complete at the time he mailed the interrogatory answers during the litigation because the scheme entailed Mr. Newmark's continued attempts to conceal his fraudulent behavior. The Government contends that the scheme was still ongoing because at the time the mailing occurred Mr. Newmark "had still not disclosed the existence of his deceit [concerning his false selfrepresentation as an attorney] of Morgan Stanley." (Gov't Am. Resp. 17.)[23] Thus, the Government argues that Mr.

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[23] The Government argues that the mailing by Mr. Newmark sought to conceal a fraud he believed had not been revealed. Although the Walkers clearly "detected" a fraud, and sought to remedy that fraud by filing a law suit against Mr. Newmark and others in federal court, at the time Mr. Newmark mailed the answers to interrogatories the Walkers had not then yet discovered Mr. Newmark's precise role in the scheme, namely, that he misrepresented himself to Morgan Stanley as an attorney for the Walkers. Some of Mr. Newmark's interactions with Morgan Stanley were not discovered until Morgan Stanley produced its records during discovery in the civil suit. Thus, the Government argues that at the time Mr. Newmark mailed his answers to interrogatories, he sought to conceal his role in (and, hence, to perpetrate) the fraud. The Government argues that the mailing served the purpose of reducing the probability that Mr. Newmark would be "detected and apprehended" by "concealing the true nature of the fraud scheme." Therefore, according to the Government, as long as Mr. Newmark acted to keep the scheme secret, or conceal his role in the scheme, then he was acting "in furtherance" of the scheme.

Newmark's mailing of his answers to interrogatories occurred prior to the accomplishment of the "object" of the scheme.

Neither party brought to the Court's attention, and the Court has not found, any reported case with facts closely resembling the facts presented here, i.e., where a court sustained a conviction for mail fraud based on a mailing of formal discovery responses in a civil lawsuit brought as a result of an alleged fraud.[24] While the cases cited and discussed above certainly provide the Court with some guidance, they addressed decidedly different factual scenarios. As the opinions in those cases demonstrate, courts have focused on whether the use of the mails has a sufficient nexus to the object of the scheme such that it was "incident to an essential part of the scheme." Examples of evidence of the requisite nexus could be the timing of the mailing in relation to the "object" of the scheme, whether multiple victims were involved in a defendant's "ongoing fraudulent venture," whether the perpetrator of the fraud took actions to keep "duping" the victims after he had already obtained the victims' money but before he delivered

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[24] The parties cited cases where the charged mailings were sent during the pendency of the lawsuit, *see, e.g., Lebovitz, supra,* and a case where the court upheld a conviction based on a mailing of interrogatory answers, *see United States v. Peters,* 732 F.2d 1004 (1st Cir.1984). However, these cases involved schemes to defraud insurance companies where the fraud itself was carried out by filing false insurance claims, and filing lawsuits seeking to defraud insurance companies. In other words, in these cases the lawsuit in which the mailings occurred was the fraudulent vehicle or "scheme" itself, while in this case the alleged scheme was a plan to defraud the Walkers and the lawsuit, i.e., the civil suit brought by the Walkers, was a subsequent by-product of that prior scheme.

the promised goods or services, or whether the mailings were otherwise "routine" and unremarkable.

*19 For example, in *Sampson*, the mailing charged in the indictment occurred within close proximity of the other fraudulent acts comprising the scheme. Once the victims sent their money to the perpetrators of the fraud, those perpetrators immediately sent a letter to the victims to reassure them that the services they purchased would be provided. By contrast, in this case the December 16, 2003 mailing at issue was sent more than two years after the victims parted with their money in late 2001. Moreover, the concept of reassuring or "lulling" the Walkers was not alleged in the Indictment, nor was it proved at trial. The annuity transactions had long since been consummated, the Walkers were receiving monthly annuity payments as promised, and there was no evidence presented that the Walkers' sought any reassurances from the Defendants following the consummation of the transactions. There was evidence presented, mostly through Mr. Wight's testimony during the defense case, that Mr. Wight visited the Walkers a number of times from the fall of 2001 through early 2002 after the annuity transactions had consummated. Mr. Wight apparently visited the Walkers to ensure that they received the scheduled monthly annuity payments, and that they could access these funds at their local bank. The Court supposes that this behavior could be viewed as "lulling" the Walkers, but even so, Mr. Wight's visits concluded more than a year before the Walkers sued Mr. Newmark and Mr. Wight in June of 2003. Moreover, there was no evidence that anything about these intermittent

visits concerned any discussion at all by anyone about whether either or both Messrs. Newmark or Wight were or ever had been attorneys.

In addition, while the civil suit was pending, but before the mailing at issue occurred, Gary Lightman, the Walkers's counsel, already had gone so far as to inform the FBI about Mr. Newmark's activities and the Walkers' basic contentions about them.[25] Mr. Newmark's fraud had already been discovered by the victims, who had been prompted already to start a civil suit against Mr. Newmark and others, and an FBI investigation was ongoing.[26] Therefore, there

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[25] Here, the Walkers filed a civil lawsuit against Mr. Newmark in June 2003. On September 30, 2003, while the civil suit was pending, the Walkers' counsel, Mr. Lightman, provided the FBI with documents which, as FBI records indicate, "LIGHTMAN felt that the documents would assist in the [FBI's] present investigation involving" Mr. Newmark, among others. (Def.Supp.Br.Ex. G.) Mr. Newmark argues, therefore, that the mailing of the interrogatories cannot possibly postpone the Walkers bringing a lawsuit, complaining to the authorities, or generally make "detection" or "apprehension" less likely given that the civil suit was well underway and law enforcement authorities were thoroughly engaged in their investigation of Mr. Newmark.

[26] Mr. Newmark has presented a compelling argument that a victim who has already discovered the fraud, cannot be "lulled" into a false sense of security by a defendant's communications intended to either conceal the fraud or even to obstruct an official inquiry. Mr. Newmark cites only one case - from the Southern District of New York - in support of this argument, which, although it is not binding on this Court, is analytically compelling. In *United States v. Victor Teicher & Co., L.P.*, 726 F.Supp. 1424, 1434 (S.D.N.Y.1989), in the wire fraud context, the court held that a telephone call intended to obstruct an SEC insider trading investigation once the scheme had come to light was not "in furtherance of" the scheme. The scheme concerned an individual's misappropriation of information concerning a

can be no serious argument that with the mailing of the discovery answers Mr. Newmark intended to avoid detection, postpone the Walkers' "ultimate complaint to the authorities" or make his "apprehension" less likely, considerations that figured prominently in the *Sampson* and *Otto* cases. Mr. Newmark's mailing of false interrogatory answers certainly could be viewed as an attempt to gain the upper hand in the civil lawsuit brought by the Walkers, or, stated differently, an attempt to

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certain company from the Paul Weiss law firm, and the use of that information by defendant Frankel. The victim of the scheme was Paul Weiss. The telephone call that formed the basis for the wire fraud count was a call by Frankel to an employee of Drexel Burnham Lambert, in which Frankel asked that employee to destroy a page from Frankel's desk calendar. That phone call was placed *after* Frankel already knew that the SEC was investigating him for insider trading. The court stated that "the phone call was not for the purpose of executing the scheme to defraud Paul Weiss, but rather was an effort to cover up Frankel's participation in that very scheme, a scheme which had already ended and been discovered by the SEC." *Id.* The court noted that the United States specifically charged that Frankel "caused the 'destruction of documents relevant to SEC investigations.'" *Id.* The court cited the "lulling" language in *Maze* and *Schmuck* but distinguished its case, stating that Frankel did not make the phone call to lull Paul Weiss into a false sense of security or to postpone Paul Weiss's complaint to the authorities as the "authorities," i.e., the SEC, were already well aware of the scheme and were investigating it at the time of the telephone call. *Id.* Although the telephone call was, at the time it was made, intended to defraud the SEC and obstruct its investigation, the court held that the scheme was not within the reach of the wire fraud statute. *Id.* In *Victor Teicher* the communication at issue was meant to obstruct an investigation by the SEC, and was not intended to avoid liability to the victims in a civil suit. However, the case serves as a sensible example for application of the principle that once the "jig is up," a subsequent attempted "cover up" act (even if it is a "bad" act) is ill-suited to "further" the scheme.

impede or at least mitigate the Walkers' recovery of their money damages. However, it is too great a leap to view this mailing as having been sent "for the purpose of executing the scheme" to defraud the Walkers in the first instance.

Furthermore, the evidence presented in this case does not support the Government's argument that Mr. Newmark's "scheme" was "ongoing" because he sought to conceal his fraud. Instead, the evidence, viewed in the light most favorable to the Government, supports the conclusion that Mr. Newmark's "scheme" concluded shortly after the annuity transactions had been consummated. The Government did not produce sufficient evidence from which a reasonable jury could conclude that the December 16, 2003 mailing was "part of," "incident to," or "in furtherance of" the scheme to obtain money from the Walkers.

***20** The brief description of the scheme in the Indictment essentially recites the language of the mail fraud statute, i.e., it describes a scheme "to defraud ... and to obtain money and property" from the Walkers. (Indictment at 2 ¶ 7.) Few details of the charged scheme are provided. For example, the Indictment itself does not state that it was part of Mr. Newmark's scheme to keep the money fraudulently obtained, to avoid detection, to conceal past fraudulent acts, to "lull" the Walkers into a false sense of security, etc., or why such acts were part of the scheme. In other words, the Indictment does not hint at, much less describe, the actual or theoretical *purpose* or the role of the charged mailings in the context of the broader scheme to defraud the Walkers. The Indictment simply lists

discrete acts - the mailings, wire transmissions, and false declaration - which occurred well after Mr. Newmark "obtained" money from the Walkers, and charges, without explanation or connection, that these acts were "part of the scheme." Therefore, unlike the indictment in *Sampson*, which expressly charged that the mailings at issue were sent for the purpose of "lulling said victims" into a false sense of security, the Indictment in this case was entirely silent on that issue or the role of the mailing. The actual presentation of evidence at trial did nothing to tie the mailing to the "scheme" in any meaningful way.

Based on the evidence presented, it is not reasonable to infer that Mr. Newmark intended that the scheme have an indefinite, much less infinite, duration, as the Government essentially contends. To be clear, the Government did not produce any *direct* evidence that a "scheme" existed at all. As discussed in detail above, the Court concludes that the Government proved that Mr. Newmark participated in a scheme to obtain money from the Walkers. The Government's proof consisted entirely of circumstantial evidence of Mr. Wight's interaction with the Walkers, Mr. Wight's interaction with Mr. Newmark, and Mr. Newmark's interaction with Morgan Stanley. The Government now attempts to stretch that circumstantial evidence beyond its reasonable limits, arguing that "[t]here was no logically anticipated terminal date as part of the scheme, because it was essential to the scheme to continue to conceal the central operative deception: that defendants were operating under the false pretense of being attorneys to effect the sale of annuities." (Gov't Mem. Opp'n 27.) The Government

argues that this evidence points to a cover-up and an attempt to limit exposure, and that Mr. Newmark's actions in that regard were critical to the success of the fraud.

Notwithstanding the foregoing, the mailed answers to interrogatories could not have been "for the purpose of executing" a scheme to "obtain" money from the Walkers for the straightforward reason that the money had been "obtained" more than two years prior to when that mailing occurred. None of the evidence cited above bespeaks an intent on Mr. Newmark's part to keep the scheme alive into the indefinite future. Instead, the facts on which the Government rely merely evoke an intent to create the misimpression that Mr. Newmark and the people he employed were attorneys in order to convince the Walkers to purchase annuities.

*21 Undaunted, the Government argues that the jury could have found that "the scheme in this case contemplated an effort to continue in the insurance business after the Walkers were bilked, and to defend against civil claims, should victims complain, exactly as Mr. Newmark did here." (Gov't Mem. Opp'n 18.) Certainly, the Government sufficiently proved that Mr. Newmark did in fact continue in the insurance business following the Walkers' annuity transactions, and that he did defend against the civil claims brought against him by the Walkers. However, it is a long leap to conclude from those facts that the offending scheme, as contemplated from the start, necessarily involved a continuing attempt to "conceal" the fraud. It is not the case or contention, for example, that Mr. Newmark's entire insurance business was a sham, perpetrated to

coerce the Walkers into believing he would actually invest their money in appropriate investment vehicles, when, in fact, he intended to abscond with their money. Indeed, the opposite appears to be true: Mr. Newmark did, in fact, run a viable insurance business, but has been accused of posing as a lawyer.

Presumably, any perpetrator of a fraudulent scheme intends for that scheme to succeed, i.e., he seeks to obtain money from the victims, keep the money, and never get caught. However, evidence that a defendant obtained a victim's money by means of a false misrepresentation is not, in and of itself, evidence that the scheme has a potentially infinite duration, terminating only when the defendant reveals (or the victims uncover) the falsity of the misrepresentation.[27] The Government refers to other

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[27] To understand this proposition, conspiracy case law is a helpful guide. In *Grunewald v. United States*, 353 U.S. 391, 401-02, 77 S.Ct. 963, 1 L.Ed.2d 931 (1957), the Supreme Court stated that "after the central criminal purposes of a conspiracy have been attained, a subsidiary conspiracy to conceal may not be implied from circumstantial evidence showing merely that the conspiracy was kept a secret and that the conspirators took care to cover up their crime in order to escape detection and punishment." In that case, the Supreme Court criticized the Government's attempt to "widen[ ] the scope of conspiracy prosecutions" by "extend[ing] the life of a conspiracy indefinitely." *Id.* at 402. The Court held:

> We cannot accede to the proposition that the duration of a conspiracy can be indefinitely lengthened merely because the conspiracy is kept a secret, and merely because the conspirators take steps to bury their traces, in order to avoid detection and punishment after the central criminal purpose has been accomplished.

Id. at 405. Moreover, in the conspiracy context the Supreme Court appears to require "direct evidence that the conspirators originally expressly agreed to conceal the conspiracy," *United*

"victims" in its response papers, but it did not present any evidence at trial that Mr. Newmark or the other supposed culprits in this case perpetrated this scheme or any other scheme on any others. Certainly, the Government did offer evidence that Mr. Newmark sent mailings and made telephone calls advertising Mr. Bohmueller's services that reached thousands of people. However, the Government has not alleged that those marketing mailings themselves, or the telephone solicitations, involved any overt misrepresentations. In addition, the Government has not alleged that Mr. Newmark (or others under his control) falsely misrepresented himself (or themselves) as an attorney, or made any other false misrepresentation, in order to fraudulently deceive any other customers and causing purchases of insurance products.

The Government relies heavily on the fact that Mr. Newmark's December 16, 2003 mailing contained a fraudulent misrepresentation. But this fact is not pertinent under the mail fraud statute absent proof that the mailing itself, fraudulent or otherwise, was mailed "for the purpose of executing" the scheme. Indeed, the lawfulness of the substantive content of the mailing is not determinative, given that the Supreme Court has made clear that even "innocent" mailings, i.e., those that contain no false information, *Parr*, 363 U.S. at 390, *Schmuck*, 489 U.S. at 715, or routine mailings, *Carpenter v. United*

States v. Steele, 685 F.2d 793, 803 (3d Cir.1982), and that the "act" in question furthered that purpose. *Id.* As the Court of Appeals has held, per *Grunewald*, "neither circumstantial evidence permitting an inference of an agreement to conceal, nor direct evidence that the conspirators implicitly agreed to conceal, will satisfy the prosecution's burden of production." *Id.*

States, 484 U.S. 19, 28, 108 S.Ct. 316, 98 L.Ed.2d 275 (1987), may satisfy the elements of mail fraud as long as they are mailed "in furtherance of" the scheme.[28]

*22 On the basis of the prevailing case law discussed above, together with logic and common sense, and the extensive and excellent briefing and oral arguments by all counsel on this particular issue, the Court concludes that the mailing of the interrogatory answers as charged in Count Three of the Indictment cannot fairly be said to have been sent "for the purpose of executing" the scheme to obtain money from the Walkers.[29] For the reasons provided above, a judgment of acquittal will be entered in Mr. Newmark's favor with respect to Count Three of the Indictment.[30]

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[28] If Mr. Newmark's scheme truly encompassed an organized strategy to conceal his prior fraudulent acts, and avoid all civil liability, then one would have expected an indictment that charged Mr. Newmark for every mailing of every piece of correspondence, pleading or motion filed in the Walkers' civil litigation.

[29] This conclusion should in no way be misinterpreted to excuse or minimize the damage that can be done to the litigation process by failing to punish or penalize appropriately those who would erode or abuse the integrity of that process by perpetrating falsehoods in discovery responses. The Court would expect discovery abuses in civil litigation to be met with appropriate sanctions. Nonetheless, in the present case, however reprehensible the spewing of untruthful discovery responses would be from the standpoint of one who seeks to preserve the integrity of the adversarial system, they cannot also be said to be punishable by a conviction for mail fraud.

[30] Mr. Newmark also argues that the Count Three mail fraud charge must be dismissed because the Government failed to prove "causation," i.e., that although Mr. Newmark did not

D. Count 5 - False Material Declaration Under Oath in Violation of 18U.S.C. § 1623(a)

The jury also convicted Mr. Newmark of one count of making a false material declaration under oath in

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personally mail the interrogatory answers at issue, he may still be charged for mail fraud because he "caused" the mailing. Mr. Newmark argues that the Government did not prove that the charged mailing was reasonably foreseeable to Mr. Newmark, or that the mailing followed in the normal course of business and Mr. Newmark had knowledge of that course of business.

In *Pereira v. United States*, 347 U.S. 1, 8-9, 74 S.Ct. 358, 98 L.Ed. 435 (1954), the Supreme Court held that one "causes" the mails to be used where he "does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended ..." Generally, courts have found the "causation" element to be satisfied fairly easily, and, given the facts of this case, it is certainly not a novel proposition that parties to a civil ligation will exchange discovery documents through the mail. The Government presented evidence that the interrogatories at issue here were, in fact, mailed. However, the Court notes that the Government did not introduce any evidence, either through the testimony of Mr. Lightman or otherwise, that serving interrogatories, or responses thereto, through the mail is customary in civil litigation or that it occurs "in the ordinary course of business." In today's legal environment, it may be just as likely that discovery documents, and numerous other routine mailings that occur frequently during the course of a civil litigation, are delivered by hand, sent by a private courier, or sent through electronic means. The Government did not provide any evidence that the use of the mails in this case was any more foreseeable than any alternative method. Certainly, the Government did not provide any evidence (or argument) that Mr. Newmark had any knowledge that the mails would be used. However, because the Court concludes that a judgment of acquittal must be entered as to Count Three for the other reasons discussed above, the Court need not decide this issue on the basis of Mr. Newmark's "causation" argument.

violation of 18 U.S.C. § 1623(a), which provides:

> *Whoever under oath* (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code) in any proceeding before or ancillary to any court or grand jury of the United States *knowingly makes any false material declaration* or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 1623(a) (emphasis added). This Count in the Indictment is based on Mr. Newmark's statement under oath in a January 21, 2004 deposition in the civil litigation that he had never held himself out as an attorney. The deposition was held during the discovery phase of the suit brought by the Walkers against Mr. Newmark and others. The pertinent questions and answers from the deposition are as follows:

> Q. Do you remember, Mr. Newmark, both in your conversation with Mr. Bogdanoff and in your conversation with Mr. Zeyer falsely telling them that you were an attorney for [the Walkers]?
>
> A. No.
>
> * * *
>
> Q. You don't remember that do you?
>
> A. No.
>
> Q. You don't recall or you didn't do that?
>
> A. *I've never represented myself as an attorney.*
>
> Q. For [the Walkers] or for anybody?
>
> A. *For anybody.*

(Indictment at 7-8.) [31] Therefore, the statement that Mr. Newmark was convicted of falsely making was, essentially, "I've never represented myself as an attorney for anybody."

Mr. Newmark challenges the Government's evidence with respect to Count Five on three grounds. First, Mr. Newmark argues that Mr. Zeyer's testimony at trial is insufficient to prove that Mr. Newmark misrepresented himself as an attorney for the Walkers. Second, Mr. Newmark argues that the Government failed to prove "materiality," which is an essential element of this crime under 18 U.S.C. § 1623(a). Finally, Mr. Newmark argues that the questions and answers from his deposition are so poorly worded, ambiguous, and susceptible of

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[31] This deposition testimony appears here as it appeared in the Indictment, including the emphasis. For further context, and as presented at trial, before Mr. Newmark was asked the first question presented in the Indictment, he was asked the following question and gave the following answer:

Q. Do you remember speaking with Chris Zeyer?

A. Don't know.

(Gov't Ex. 123, B. Newmark Dep. Excerpt No. 21 at 1, Jan. 21, 2004.) In the same portion of the deposition transcript, Mr. Newmark was asked the following questions and gave the following answers:

Q. Do you recall having a telephone conversation with Chris Zeyer on August 31, 2001?

A. Yes.

Q. In that telephone call, did you identify yourself as attorney for Arthur and Thomas Walker?

A. No.

Q. You did not. Did you ever hold yourself out to anyone at Morgan Stanley as an attorney for Thomas and Arthur Walker?

A. No.

(Gov't Ex. 123, B. Newmark Dep. Excerpt No. 21 at 2, Jan. 21, 2004.)

numerous interpretations, that they cannot support a false declaration charge or conviction.

1. *Sufficiency of Evidence that Mr. Newmark Misrepresented Himself as an Attorney to Mr. Zeyer*

*23 Mr. Newmark argues that the Government produced insufficient evidence that the false declaration that formed the basis for the § 1623 charge was, in fact, false, and that he knew it was false when he made it. He argues that the Government failed to prove beyond a reasonable doubt that he falsely misrepresented himself as an attorney for the Walkers during his interaction with Morgan Stanley. The basis for this charge lies almost exclusively in the testimony of Mr. Zeyer, who worked in the compliance department at Morgan Stanley in New York City in August 2001. He testified that on August 31, 2001 he received a "verbal complaint" from Mr. Newmark during a telephone call that Mr. Newmark made to Morgan Stanley regarding the Walkers' accounts. (Trial Tr. C. Zeyer 7:9-13.) At trial, counsel for the Government showed Mr. Zeyer a copy of a "verbal complaint form," which Mr. Zeyer testified he had written on the day he received the telephone call from Mr. Newmark, but after the call had concluded. (Trial Tr. C. Zeyer 8:9-14.) The verbal complaint form indicated that the caller's name was Brian Newmark (Trial Tr. C. Zeyer 9:16), and next to Mr. Newmark's name on the form, Mr. Zeyer testified that he had written "Attorney for Arthur and Thomas Walker." (Trial Tr. C. Zeyer 9:17-19.) When asked why he wrote that, Mr. Zeyer responded:

> Because Brian Newmark was not part of the accounts for Arthur or Thomas Walker, he was

> what's called a third party, somebody that is not listed or indicated on the account itself. When we have somebody like that, when we have a third party, we ask the caller what is their relation to the client. At this time, since I have it written here, I would ask what the relation to the client is and he would tell me - he told me he's an attorney, or he would have just freely indicated that I am an attorney for ... Arthur and Thomas Walker.

(Trial Tr. C. Zeyer 9:21-10:5.) Throughout the text of the verbal complaint form, in which Mr. Zeyer describes the information Mr. Newmark conveyed to him over the telephone, Mr. Zeyer referred to Mr. Newmark as "Attorney." (*See* Gov't Trial Ex. 90 at 2.) At trial, counsel for the Government walked Mr. Zeyer through much of the text of the verbal complaint form. (*See generally* Trial Tr. C. Zeyer 11:11-13:10.) Mr. Zeyer testified that, at the time of the telephone conversation in question, it was not significant to him whether the caller (i.e., Mr. Newmark) was or was not an attorney. (Trial Tr. C. Zeyer 14:7-13.)

The Government's counsel asked Mr. Zeyer whether he checked with "the caller" to confirm any of the information the caller provided, and Mr. Zeyer testified that his "normal procedure would be is after I have a discussion with a caller or a complainant to read back my notes, just so I can - just so the - that individual understands of how I'm going to file his complaint on his behalf or her behalf ...." (Trial Tr. C. Zeyer 14:19-25.)

At trial, the Assistant U.S. Attorney also walked Mr. Zeyer through the fax cover sheet that Mr. Newmark had sent to Mr. Zeyer on August 31, 2001, after the

telephone conversation took place. The name "Bohmueller Law Offices" appears on the top of the fax cover sheet. In the text of the fax cover sheet, Mr. Newmark stated:

> *24 Chris: Per our conversation, I am attaching some of the correspondence between my clients and your company. As this has already taken one month, we request your immediate attention.
>
> When this matter is resolved, please notify me by fax at 610-789-7813 as the Walkers are anxious to get this resolved.
>
> Thank you in advance for your help in this matter.
>
> Sincerely,
>
> Brian J. Newmark

(Gov't Trial Ex. 91.; Trial Tr. C. Zeyer 15:8-17:14 (generally discussing fax cover sheet)).

On cross-examination, defense counsel asked Mr. Zeyer, "[i]s it your testimony, sir, that as you sit here today you have a distinct recollection of this telephone call?" Mr. Zeyer responded, "No." (Trial Tr. C. Zeyer 26:23-27:1.) Further, when asked whether he recalled "word-for-word the conversation with Mr. Newmark as we sit here today," Mr. Zeyer stated that "[a]gain, it probably - it probably just wasn't a memorable conversation, it was just one of many different complaints taken." (Trial Tr. C. Zeyer 40:24-41:3.)

Defense counsel questioned Mr. Zeyer about the procedures he typically utilized when receiving a complaint call. Mr. Zeyer summarized those procedures as follows:

> You would receive the call, you would make your notes, you would read them back to the individual

> for accuracy, you would then at that time when the call is finished is to then to start writing ... or drafting your verbal complaint. If the supporting documentation comes in, you collect the supporting documentation and you put it with your verbal complaint.

(Trial Tr. C. Zeyer 28:19-25.) Notably, Mr. Zeyer never testified that he actually followed these procedures with respect to Mr. Newmark's August 31, 2001 telephone call - a point defense counsel emphasizes now.

Mr. Newmark argues that the Government's evidence does not support its argument that Mr. Newmark unambiguously or unequivocally said to Mr. Zeyer of Morgan Stanley "I am an attorney," or words to that effect. He argues that the only evidence that could plausibly support the jury's conviction on this count was Mr. Zeyer's testimony, and Mr. Zeyer, in effect, only testified as to what Mr. Newmark "would have" said, but he never stated what Mr. Newmark actually told him.

After repeated review of Mr. Zeyer's testimony, the Court concludes that the Government's evidence is insufficient to prove that Mr. Newmark's deposition statement was false. In order to prove that Mr. Newmark's deposition statement that he had never represented himself as an attorney is false, the Government must prove that Mr. Newmark actually falsely misrepresented himself as an attorney. The Government's argument amounts to the contention that if Mr. Zeyer wrote on the verbal complaint form that Mr. Newmark was the "Attorney for Arthur and Thomas Walker," then it must be because Mr. Newmark so stated.

Viewing the evidence in the light most favorable to the Government, as the Court must in considering a Rule 29 motion, the Court concludes that the evidence actually is sufficient to infer at most that Mr. Newmark aggressively sought to create the misimpression that he was an attorney for the Walkers. The record does not contain sufficient evidence that Mr. Newmark affirmatively misrepresented himself as an attorney. Mr. Newmark's counsel is correct that the only evidence presented by the Government that plausibly could prove that Mr. Newmark affirmatively "represented" himself as an attorney for the Walkers is Mr. Zeyer's testimony about the telephone discussion between Mr. Zeyer and Mr. Newmark. However, based on Mr. Zeyer's testimony, it appears equally likely that Mr. Zeyer could have concluded that Mr. Newmark was an attorney either based on statements by Mr. Newmark himself or based on a personal deduction by Mr. Zeyer from a combination of other pieces of information, including information contained in the Walkers' account files, or subsequent communications by Mr. Newmark, including the August 31, 2001 facsimile.

*25 Mr. Zeyer testified candidly that he did not distinctly recall his August 31, 2001 telephone conversation with Mr. Newmark. Therefore, Mr. Zeyer was unable to, and did not, testify as to exactly what Mr. Newmark said or how he identified himself during this telephone conversation. It is clear however, that Mr. Zeyer did not affirmatively state that Mr. Newmark actually stated that he was an attorney. Instead, he spoke in terms of the process he and his department typically employed when

receiving complaint calls: "When we have somebody like that, when we have a third party, we ask the caller what is their relation to the client." (Trial Tr. C. Zeyer 9:24-10:1). When counsel for the Government asked Mr. Zeyer why he had identified Mr. Newmark as an attorney on the verbal complaint form, Mr. Zeyer spoke in terms of what Mr. Newmark "would" have stated. He testified that on the date in question, "since I have it written here [on the verbal complaint form], I *would* ask what the relation to the client is and he *would* tell me - he told me he's an attorney, or he *would* have just freely indicated that I am an attorney ...." (Trial Tr. C. Zeyer 10:1-4) (emphasis added). Not unlike Mr. Zeyer's markedly equivocal testimony that led to the dismissal of Count Two during trial, upon review of the transcript Mr. Zeyer's testimony in this regard as to Count Five is uncertain and speculative. He does not remember the telephone call, and did not testify as to what procedures he utilized on that date. He merely recounts what procedures Morgan Stanley's representatives, using the collective pronoun "we," "would have" utilized in a similar situation, i.e., when a recognized third party calls regarding a specific account.

Mr. Zeyer's testimony as to what information he relied upon or utilized in creating the verbal complaint form also is speculative. He testified that he took handwritten notes, and reviewed the Walkers' account file on Morgan Stanley's computer system. In addition, he testified that when he received additional information, such as the fax Mr. Newmark sent to him shortly after the telephone call, he "would read through" these documents before preparing the verbal complaint form. (Trial Tr. C.

Zeyer 28:5-10.) However, he testified that while he would review additional information, "usually when I write a verbal complaint it's off" his handwritten notes. (Trial Tr. C. Zeyer 28:10-12.) Again, Mr. Zeyer provided this testimony in the context of questioning about the process he typically employed, and did not state (or recall) what documents he actually reviewed in preparing the verbal complaint form to memorialize his August 31, 2001 call with Mr. Newmark.

The Court's conclusion is driven by Mr. Zeyer's candid testimony on cross examination that he did not recall his August 31, 2007 conversation with Mr. Newmark. His lack of recollection permeates the remainder of his testimony, most of which amounts to speculation and conjecture. Certainly, Mr. Zeyer recognized the documentary evidence that the Government offered, such as the verbal complaint form, and the fax cover sheet that he sent to Morgan Stanley's Scranton branch office containing the materials that he received from Mr. Newmark, as his own work. However, by and large, even under the relaxed scrutiny of favoring the Government, Mr. Zeyer's testimony cannot be characterized as self-confident, conclusive or qualitatively sufficient to support a conviction on this Count. He testified about the process he typically employed when receiving complaints, but never testified what process he employed on August 31, 2001. In short, Mr. Zeyer does not state that Mr. Newmark represented himself as an attorney for the Walkers, or for anybody, and no other direct or circumstantial evidence supports that charge. Accordingly, a judgment of acquittal will be entered as to Count Five of the Complaint.

*26 However, even if the Court were to conclude that Mr. Zeyer's testimony was sufficient to support the conclusion that Mr. Newmark had represented himself as a lawyer, that would not end the inquiry about Count Three.

2. *Sufficiency of Evidence of "Materiality"*

Mr. Newmark argues that Government's evidence was insufficient to support a jury finding that his false statement during his deposition was "material." Title 18 U.S.C. § 1623(a) proscribes "knowingly making any false *material* declaration" under oath in a proceeding before a court. 18 U.S.C. § 1623(a) (emphasis added). To prove a violation of § 1623(a), the Government was required to show that Mr. Newmark knowingly made a false material declaration during his deposition in the civil litigation. *See Johnson v. United States,* 520 U.S. 461, 465, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997) ("there is no doubt that materiality is an element of perjury under § 1623"); *United States v. McLaughlin,* 386 F.3d 547, 552 (3d Cir.2004) (" 'materiality' is an element of ...18 U.S.C. § 1623"). Because Mr. Newmark made the disputed statements at a deposition in a civil lawsuit, the Government must prove the statements were material to the underlying civil litigation. *See United States v. Allen,* 892 F.2d 66, 68 (10th Cir.1989) ("The materiality test is determined at the time and for the purpose for which the allegedly false statement was made.").

Materiality under § 1623 requires only that the defendant's statements "[had] a 'natural tendency to influence, or [were] capable of influencing, the

decision of the decisionmaking body to which it is addressed.' " *United States v. Gaudin,* 515 U.S. 506, 509, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995) (*quoting Kungys v. United States,* 485 U.S. 759, 770, 108 S.Ct. 1537, 99 L.Ed.2d 839 (1988)); *see also United States v. Barrett,* 111 F.3d 947, 953 (D.C.Cir.1997) (stating that a false statement is material within the meaning of § 1623 if the statement "has a natural tendency to influence, or was capable of influencing, the decision of the tribunal in making a particular determination"); *United States v. Adams,* 870 F.2d 1140, 1147 (6th Cir.1989) ("The test of whether a false declaration satisfies the materiality requirement is whether a truthful statement might have assisted or influenced the tribunal in its inquiry."). Certainly, "materiality," an element of the crime charged, must be determined by the jury beyond a reasonable doubt. *Gaudin,* 515 U.S. at 522-23.

It is not precisely clear how the concept of "materiality" should be understood in the context of a false statement made during a deposition in a civil suit, as opposed to, for example, a grand jury proceeding. As the Court of Appeals for the Fourth Circuit has explained, "[g]iven that a deponent's testimony is not actually addressed to a decision-making body, [the materiality] standard does not neatly apply when ... the defendant is charged with committing perjury in a civil deposition." *United States v. Wilkinson,* 137 F.3d 214, 225 (4th Cir.1998). The *Wilkinson* court noted that appellate courts have adopted varying standards for determining the materiality of statements given in depositions. *See id.* The Second Circuit Court of Appeals has held that a statement given in a government deposition in

a forfeiture action under 21 U.S.C. § 881 is "material" if "a truthful answer might reasonably be calculated to lead to the discovery of evidence admissible at ... trial" because such actions, though civil in form, "are predicated upon a nexus between the property and criminal activity." *United States v. Kross,* 14 F.3d 751, 754 (2d Cir.1994).[32] The Fifth Circuit Court of Appeals similarly held that the materiality of statements given in a civil deposition is not limited to issues specifically raised at trial or evidence admissible at trial, but includes matters

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[32] The Second Circuit Court of Appeals pointed out that in a § 1623 prosecution for false declarations to a grand jury, "matters arguably cumulative or collateral to the grand jury's objective in a given case are considered for their potential to aid that body, not for the probability of assistance from a truthful answer." *United States v. Kross,* 14 F.3d 751, 753 (2d Cir.1994) (*United States v. Gribben,* 984 F.2d 47, 51 (2d Cir.1993)). Materiality in the grand jury context is "broadly construed" because the grand jury's function is investigative. *Id.* Similarly, the Second Circuit noted that the purpose of civil discovery is also investigative, and the scope of discovery includes any information that "appears reasonably calculated to lead to the discovery of admissible evidence." Fed.R.Civ.P. 26(b)(1).

In *Kross,* the Second Circuit Court of Appeals noted the narrower standard that had been adopted by the Ninth and Sixth Circuits, but held that the facts presented in *Kross,* which addressed the materiality of a false declaration made in the context of a government deposition in a forfeiture action under 21 U.S.C. § 881, favored "a broad construction of the definition of materiality similar to the approach" used in the grand jury context. *Kross,* 14 F.3d at 754. The court noted that while a deposition in a forfeiture action under 21 U.S.C. § 881 is civil in form, forfeiture actions are predicated upon a nexus between the property and criminal activity. *Id.* In that context, the court adhered to the "broad standard for materiality of whether a truthful answer might reasonably be calculated to lead to the discovery of evidence admissible at the trial of the underlying suit." *Id.*

properly the subject of and material to a deposition under Fed.R.Civ.P. 26(b)(1). *See United States v. Holley*, 942 F.2d 916, 924 (5th Cir.1991).

*27 By contrast, the Sixth and Ninth Circuits have adopted a "considerably higher standard of materiality," for § 1623 false declaration prosecutions based on allegedly false testimony provided during a civil deposition. *Wilkinson*, 137 F.3d at 225 (*citing United States v. Adams*, 870 F.2d 1140, 1147 (6th Cir.1989); *United States v. Clark*, 918 F.2d 843, 847 (9th Cir.1990)). In *Adams*, the Sixth Circuit Court of Appeals held that a false statement given in a deposition is "material" if a truthful statement might have assisted or influenced the fact finder in the underlying lawsuit, 870 F.2d at 1147, while in *Clark*, the Ninth Circuit Court of Appeals defined "materiality" in this context as whether the false statement had a "tendency to influence, or was capable of influencing, the decision of the decision-making body to which it was addressed" from the perspective of the jury in the civil case, 918 F.2d 843, 847 (internal quotation marks omitted). The *Wilkinson* court did not adopt either of these standards, concluding that "overwhelming evidence establishes that the nature of [the defendant's] false declaration unquestionably meets the more stringent standard adopted by the Sixth and Ninth Circuits requiring that the topic of the declaration at issue be discoverable and have the tendency to affect the outcome of the civil suit involved." 137 F.3d at 228.

In the underlying civil litigation here, the Walkers alleged claims of fraud against Mr. Newmark, Mr. Wight and others. The Walkers alleged that Mr.

Newmark and people in his employ made false representations to the Walkers in attempting to sell them high-priced annuity products. Specifically, one of the alleged misrepresentations at issue was the Walkers' allegations that Mr. Newmark or those in his employ falsely held themselves out as attorneys. *However, none of those details were provided to the jury in this criminal trial.*Mr. Newmark now argues that the Government failed to produce any, or at least sufficient, evidence that his false testimony was material to the issues before the fact-finder in that prior litigation because the Government failed to adequately describe the nature and circumstances of the Walkers' civil litigation. Accordingly, he argues that a judgment of acquittal must be entered with respect to Count Five of the Indictment.[33]

In response to Mr. Newmark's motion, the Government endeavors to present some argument as to why Mr. Newmark's deposition statement that he had not held himself out as a lawyer was "material." However, read closely, the Government's argument merely amounts to the proposition that Mr. Newmark's false statement at the deposition was "material" because it was false. Moreover, the Government cites no helpful case law in support of its argument.[34]

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[33] In the Indictment, Count Five stated that "[i]t was material to the litigation in the Eastern District of Pennsylvania, Civil Action No. 03-3750, to determine whether defendant BRIAN J. NEWMARK ever represented himself as an attorney for AW and TW." (Indictment at 7 ¶ 2.)

[34] The Government cites only one case, *Johnson v. United States*, 520 U.S. 461, 470, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997), in support of its argument that it presented sufficient evidence of "materiality." *Johnson* is off point. Moreover,

Given the allegations in the civil litigation between the Walkers and Mr. Newmark, there is little doubt that the "topic of the declaration at issue [would] be discoverable and have the tendency to affect the outcome of the civil suit involved." *Wilkinson,* 137 F.3d at 228. Mr. Newmark's false statement denying having misrepresented himself as an attorney for the Walkers would certainly "have the tendency to affect the outcome" of a lawsuit in which the identical

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citation to *Johnson* arguably is misleading. In *Johnson,* the Supreme Court was presented with the question of whether the trial court committed reversible error by failing to submit the issue of materiality to the jury. The issue was *not* whether the evidence presented to the jury was sufficient to sustain a conviction. The Supreme Court, as well as the court of appeals, stated the evidence offered at trial supporting materiality was "overwhelming," and that materiality was "essentially uncontroverted at trial" and "remained so on appeal." *Id.* Clearly, those are not the circumstances here, where the very issue of the sufficiency of evidence on "materiality" is being contested.

Secondly, the Government cited *Johnson* for the proposition that "there is 'no plausible argument' that the lie under oath was 'somehow not material.' " (Gov't Mem. Opp'n 45-46.) This quoted language is taken out of context. In *Johnson,* the Supreme Court stated:

> Before the Eleventh Circuit and in her briefing before this Court, petitioner has presented *no plausible argument* that the false statement under oath for which she was convicted - lying about the source of the tens of thousands of dollars she used to improve her home - was *somehow not material* to the grand jury investigation.

Id. (emphasis added). Viewed in context, the quoted language is quite different from the way the Government presented it to the Court, which implied that the Supreme Court held that there cannot possibly be "any plausible argument" that a lie is not material. However, as a matter of substance a lie is not material simply because it is a lie. If that was the case, the "materiality" requirement of § 1623 would be redundant.

fraudulent misrepresentation is alleged. In cases where the Government has laid the necessary groundwork regarding the facts of the underlying action, and the context in which the false statement was made, courts have found the "materiality" element of § 1623 to be satisfied fairly easily. *See, e.g., United States v. McKenna,* 327 F.3d 830, 839-840 (9th Cir.2003) (finding the "materiality" element to be satisfied where the defendant's statements "were capable - at least to some degree - of affecting the [fact finder's] decision-making process in the civil trial, because they would have been admissible to impeach [the defendant's] credibility if she testified against the government at trial."); *United States v. Sablosky,* 810 F.2d 167, 169 (8th Cir.1987) (finding "materiality" where the false statement "clearly related to the integrity of the evidence and [the defendant's] credibility as a witness" in the underlying litigation, such that the "false statement might have influenced the fact-finder at the 1984 trial in deciding the questions before it."). In the context of a false statement made during the course of a grand jury investigation, "materiality" may be proven by sufficient "evidence of the nature of the grand jury investigation," including evidence establishing the allegations the grand jury was investigating, and how truthful answers from the witness could have assisted that investigation. *United States v. Regan,* 103 F.3d 1072, 1084-85 (2d Cir.1997).[35] The government may prove "materiality"

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[35] In *Regan,* the Court of Appeals for the Second Circuit rejected the defendant's argument that the Government did not prove "materiality," and affirmed the perjury conviction. 103 F.3d at 1084. The grand jury proceedings involved an investigation by the New York City Police, assisted by federal authorities, in trying to find out whether members of the New

by, for example, introducing a transcript of the grand jury proceedings, producing testimony from the foreperson of the grand jury, or producing the testimony of the defendant before the grand jury. *See United States v. Ostertag*, 671 F.2d 262, 265 (8th Cir.1982) (citations omitted).

*28 Here, the question arises whether the Government presented to the jury sufficient evidence concerning the circumstances of the Walkers' civil suit, and the context in which Mr. Newmark's false statement arose, so that a jury could find the element of "materiality" to have been proven beyond a reasonable doubt. Without a sufficient understanding of the claims and issues involved in a civil litigation, the jury would not be equipped to

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York City Police Department Anti-Crime Unit had used illegal tactics in making arrests and had lied about the circumstances of various arrests. On appeal, the court reviewed the trial transcript, which, it concluded, showed that "the government presented ample evidence about the nature of the investigation in relation to which [the defendant] testified before the Grand Jury." *Id.* The evidence presented at trial included testimony from an Assistant United States Attorney and a New York City Police Officer who described the allegations concerning the Anti-Crime Unit and the resulting investigation of that Unit. *Id.* These individuals testified that the investigation was still pending when the defendant testified, that significant questions were then still unanswered, and that the defendant was the best person available to answer these questions. *Id.* The court also noted that both the questions posed to the defendant during his grand jury appearance and his answers were read into evidence, and that "[t]hese questions and answers provided the trial jury with additional information about the nature of the grand jury investigation." *Id.* The defendant himself testified that the Anti-Crime Unit had been under investigation for two years, and that certain cases about which he testified were subjects of that investigations. *Id.*

determine whether a statement is "material" to that litigation.

The Government contends that the jury heard a sufficient description of the circumstances of the Walker-Newmark civil litigation to evaluate whether Mr. Newmark's false statement was "material" to that litigation. The Government points to the testimony of Gary Lightman, who was the Walkers' attorney in the civil action, the parties' stipulations that Mr. Newmark (and other defendants in the civil litigation) settled for approximately $2.9 million, and the fact that Mr. Newmark settled with the Walkers after the January 21, 2004 deposition at issue.[36] The Government concedes, however, that "Mr. Lightman did not testify that the civil litigation alleged misrepresentations." (Gov't Jan. 11, 2008 Letter at 5.)

The Government's concession in this regard is accurate and fundamental to the issue at hand. At trial the Government did not present any evidence that the Walkers' civil suit involved allegations of fraud or any misrepresentations of fact. Indeed, very little information about the substance of the civil litigation was presented to the jury at all. Mr. Lightman merely testified that he represented the Walkers in a "civil action," in which the Walkers sued Mr. Newmark, among others. (Oct. 18, 2007 Trial Tr. 12:3-13.) Mr. Lightman did *not* even testify as to the allegations contained in the Walkers' civil

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[36] See *infra* note 37 regarding the confusion surrounding the issue of when the parties actually settled the Walkers' claims against Mr. Newmark, as well as the Walkers' claims against the other defendants in the civil action.

complaint, or of Mr. Newmark's defenses.

The 41 excerpts of Mr. Newmark's and Mr. Wight's depositions from the civil suit that were read to the jury here through Mr. Lightman's testimony do provide various details of the "scheme." At his January 21, 2004 deposition, as read to the criminal trial jury, Mr. Newmark testified that he sold a "charitable gift annuity" to the Walkers, and that it was the first of those products that he had ever sold. (Gov't Ex. 123, B. Newmark Dep. Excerpt No. 3, Jan. 21, 2004.) He further testified that the transaction was worth approximately $3.5 million. (Gov't Ex. 123, B. Newmark Dep. Excerpt No. 4, Jan. 21, 2004.) Both Mr. Newmark and Mr. Wight testified during their depositions as to their roles in selling the annuities to the Walkers and ensuring that Morgan Stanley facilitated the transaction. None of the excerpts described the claims or defenses in the civil suit.

In addition, in this prosecution the parties stipulated that:

> 4. On June 23, 2003, Arthur and Thomas Walker filed a civil lawsuit against several parties including Brian Newmark and John Wight. This civil suit was resolved by settlements in December of 2004 with no admissions of fault by any party.[37]

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[37] The original stipulation, which the Government's counsel read to the jury during the Government's case, stated that the civil suit was resolved in December of 2003 with no admission of fault by any party. (Oct. 18, 2007 Trial Tr. 188:6-10.) Immediately thereafter, before the Government rested its case, all counsel agreed that the correct date should have been December 2004, and the Government's counsel noted that

*29 5. As part of the settlement of this civil suit, Arthur Walker and Thomas Walker received a total of $2.9 million is [sic] cash in addition to the combined total of $723,172.69 in total monthly annuity payments which they previously received.

6. As part of the settlement of this civil suit, the

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correction for the record while the jury was present. (Oct. 18, 2007 Trial Tr. 189:14-190:2.)

However, it appears that the December 2004 date also was incorrect. After the Government rested its case in chief, the parties revised the second sentence of paragraph four of the stipulation to read as follows: "This civil suit was resolved by settlements in December of 2003 (as to New Life Corp.), March of 2004 (as to Mr. Newmark) and August of 2005 (as to Mr. Wight), with no admissions of fault by any party." (Gov't Trial Ex. 112, as revised.) Although counsel for the Government informed the Court that the parties had revised the stipulation (Oct. 22, 2007 Trial Tr. 9:24-10:6), the trial transcripts indicate that this revised language was not read to the jury. Moreover, it is unclear whether the revised stipulation was ever received into evidence or presented to the jury during their deliberations. In his response to the defense's post-trial motions, counsel for the Government stated that he was unable to determine which version of the stipulation, the corrected or uncorrected version, was actually submitted to the jury. Therefore, the record indicates that the only evidence submitted on the issue of when Mr. Newmark settled the civil suit with the Walkers, was the reading of the inaccurate stipulation stating that the civil suit "was resolved by settlements in December of 2004," even though Mr. Newmark settled with the Walkers in March of 2004. In briefing this issue related to Mr. Newmark's post-trial motions, the Government emphasizes the close proximity of Mr. Newmark's allegedly false deposition testimony in January 2004 and the fact that he settled portion of the lawsuit two months later in March 2004. However, because it is unclear that the jury ever heard accurate evidence of when Mr. Newmark settled the suit, the potential impact of this temporal connection is lost.

> Walkers' interest in further annuity payments was ended.

(Gov't Ex. 112, Stipulation.) These stipulations were read into evidence during the criminal trial. (Oct. 18, 2007 Trial Tr. 188:6-18; 189:14-190:2.)

The challenge presented by the precise materiality issue here requires considerable discipline to strictly review only the evidence actually presented to the jury. Understandably, counsel who have long figuratively lived and breathed the myriad of details of a case, and even the Court that has heard and read a host of pretrial arguments and presentations, may have some difficulty delineating precisely the line between the evidence presented and a knowledge base about the case. This may be all the more so for lawyers contemplating an issue about a representation or misrepresentation about someone's supposed status as a lawyer. That is to say, lawyers may instinctively believe in the importance or potential importance of falsely holding oneself out as a lawyer, a belief that may not be shared or immediately appreciated by lay persons. Thus, it becomes important to explain to a jury that which may be second nature to the trial's principal participants. Therefore, when the trial transcript is examined with the necessary blinders that permit review only of the admitted evidence, casting aside counsel's statements and argument, it becomes surprisingly problematic to find evidence from which this jury could have concluded properly that Mr. Newmark's false deposition testimony was "material" *to the civil litigation* as required for a conviction under 18 U.S.C. § 1623(a).[38] To be sure,

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[38] During the criminal trial, Mr. Thomas Walker testified that

the deposition excerpts read into evidence by Mr. Lightman provided considerable details about the "scheme" that was at issue in the civil litigation as well as in the criminal trial. However, no one asked Mr. Lightman - or any witness - any questions about the allegations in the civil case or how Mr. Newmark's deposition falsehood or falsehoods affected the civil case. Indeed, the parties determined that, with the exception of the stipulations cited above and the specific matters in the Indictment, the parties would make no other reference to the civil suit beyond reading deposition transcripts. Looking at the trial transcript here for references to the civil litigation, the Government only introduced evidence that the Walkers were plaintiffs, Mr. Newmark was a defendant, the case involved annuities, and that the parties settled the lawsuit. The evidence included a correct representation of the settlement amount, but apparently failed to precisely define when the defendants in the civil action, including Mr. Newmark, actually settled with the plaintiffs. There was no explanation to the jury here that the civil suit involved a fraud claim, misrepresentations (by anyone) about being an attorney or misrepresentations in the sale of annuities.

*30 In the civil deposition context, the Government at least should produce sufficient evidence of the nature of the civil action at issue, including the

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he considered it important to the decision to purchase the annuities that Mr. Wight identified himself as a lawyer. This evidence, of course, did not relate to Mr. Newmark and did not relate to the civil litigation. However, the Court cannot discount the possibility of jury confusion from Mr. Walker's testimony on that point.

plaintiff's allegations, and how truthful answers from the deponent on the issue at hand could have assisted that litigation. Because the Government failed to carry this burden, the Court must conclude that the evidence presented was not sufficient for the jury to find that the necessary element of materiality of the deposition statement was proven beyond a reasonable doubt. Accordingly, in addition to the reasons discussed above relating to the insufficiency of Mr. Zeyer's testimony, for the failure of the evidence to support a finding of materiality, the Court must enter a judgment of acquittal for Mr. Newmark with respect to Count Five of the Indictment.[39]

E. Counts One, Three and Five - Constructive Amendment or Variance

Mr. Newmark argues that the evidence presented by the Government at trial "constructively amended" the Indictment, or created a prejudicial variance because the Government did not prove any

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[39] With respect to Count Five of the Indictment, Mr. Newmark also argues that the wording of Mr. Lightman's deposition questions in the civil case was so vague and Mr. Newmark's answers were so ambiguous that they are susceptible to numerous interpretations, some of which were not false or inaccurate, thus supporting overturning the conviction. Essentially, he argues that the combination of ambiguous questions and reasonable interpretations of Mr. Newmark's answers result in plausible, not untrue statements by Mr. Newmark, not the falsehoods that are the necessary predicate for these charges.

However, because the Court will grant Mr. Newmark's Rule 29 motion as to Count Five for the reasons stated above, the Court will not consider these additional interpretative arguments.

fraudulent scheme regarding a "tax deferred annuity" as charged in the Indictment. The Indictment in this case reads:

> Defendants **JOHN N. WIGHT** and **BRIAN J. NEWMARK,** and **NEWMARK's** entity EPA, sold various financial products, including "tax deferred annuities," financial products which involved a gift to a charitable organization, tax benefits, and an income stream, to elderly persons who owned substantial assets.

(Indictment at 1-2 ¶ 4.) Thereafter, the Indictment refers to "tax deferred annuities" whenever it references the precise products sold by the Defendants to the Walkers. Mr. Newmark argues that the annuities at issue in this case were not actually "tax deferred," and notes that the term "charitable gift annuities," which accurately describes the financial products sold in this case, does not appear anywhere in the Indictment.

Considerable discussion in a host of cases highlights the lines of demarcation between impermissible constructive amendments or variances on the one hand and inoffensive differences between the language in the indictment and the trial evidence on the other. "There are two types of variations between the charges in an indictment and the evidence at trial: (1) amendments of the indictment when its charging terms are altered; and (2) variances, where the charging terms of the indictment are not changed but when the evidence at the trial proves facts materially different from those alleged in the indictment." *United States v. Daraio,* 445 F.3d 253, 259 (3d Cir.2006) (*citing United States v. Castro,* 776 F.2d 1118, 1121 (3d Cir.1985)).

"An indictment is constructively amended when, in the absence of a formal amendment, the evidence and jury instructions at trial modify essential terms of the charged offense in such a way that there is a substantial likelihood that the jury may have convicted the defendant for an offense differing from the offense the indictment returned by the grand jury actually charged." *Id.*. Thus, "'a court cannot permit a defendant to be tried on charges that are not made in the indictment against him.'" *Id.* at 260 (*citing Stirone v. United States,* 361 U.S. 212, 217, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960)). "'The key inquiry is whether the defendant was convicted of the same conduct for which he was indicted.'" *Id.* (*citing United States v. Robles-Vertiz,* 155 F.3d 725, 729 (5th Cir.1998).

*31 The court of appeals has recognized that "'the line between a constructive amendment and a variance is at times difficult to draw.'" *Id.* at 261 (*quoting United States v. Adamson,* 291 F.3d 606, 615 (9th Cir.2002). There is a variance "'where the charging terms [of the indictment] are unchanged, but the evidence at trial proves facts materially different from those alleged in the indictment.'" *Id.* (*quoting Castro,* 776 F.2d at 1121). The court stated:

> When there has not been a constructive amendment of the indictment but rather there only has been a variance between the facts alleged in the indictment and the evidence offered at trial, the proceedings at the trial will not have usurped the constitutionally guaranteed role of the grand jury. Instead, the concerns raised by a variance argument are the fairness of the trial and the protection of the defendant's right to notice of the charges against her and her opportunity to be

heard.

Id. (*citing Kotteakos v. United States*, 328 U.S. 750, 757-58, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946); *Berger v. United States*, 295 U.S. 78, 81-82, 55 S.Ct. 629, 79 L.Ed. 1314 (1935))." '[T]he variance rule, to the extent that it is constitutionally required, is more of a due process rule than is the flat fifth amendment prohibition against being tried on an indictment which a grand jury never returned.' " *Daraio*, 445 F.3d at 261-62 (*quoting United States v. Crocker*, 568 F.2d 1049, 1059 (3d Cir.1977)). In order to reverse a conviction due to a variance, the variance must be likely to have surprised or otherwise has prejudiced the defense. *See United States v. Schurr*, 775 F.2d 549, 553-54 (3d Cir.1985). To demonstrate prejudice from a variance, a defendant "must show (1) that there was a variance between the indictment and the proof adduced at trial and (2) that the variance prejudiced some substantial right." *United States v. Balter*, 91 F.3d 427, 441 (3d Cir.1996). "A variance does not prejudice a defendant's substantial rights (1) if the indictment sufficiently informs the defendant of the charges against him so that he may prepare his defense and not be misled or surprised at trial, [or] (2) if the variance is not such that it will present a danger that the defendant may be prosecuted a second time for the same offense." *United States v. Schoenhut*, 576 F.2d 1010, 1021-22 (3d Cir.1978); *see United States v. Daraio*, 445 F.3d 253, 262 (3d Cir.2006).

Mr. Newmark's correctly cites a technical inaccuracy in the Indictment in that the annuities sold to the Walkers were not in fact "tax deferred." However, the Indictment does accurately describe the annuities as "financial products which involved a gift

to a charitable organization, tax benefits, and an income stream." (Indictment at 1-2 ¶ 4.) Expert witnesses called by the Government and for the defense both testified at trial that the annuities at issue in this case embodied these three characteristics. "Tax deferred annuities" was merely the convenient shorthand term that was used to refer to the annuities products in this case. Therefore, although the Indictment may have inaccurately labeled the financial instruments that the Walkers actually purchased, the Indictment accurately describes the characteristics of those products. On this basis, Mr. Newmark cannot credibly argue that he was convicted of offenses that were not charged in the Indictment, which could constitute a constructive amendment, or that the Indictment misinformed him so that he did not have fair notice of the actual charges against him, which could constitute a variance. Accordingly, Mr. Newmark's motion on these grounds will be denied.

II. MR. NEWMARK'S RULE 33 MOTION FOR A NEW TRIAL

*32 Under Federal Rule of Criminal Procedure 33, upon the defendant's motion, the Court "*may* vacate any judgment and grant a new trial if the interest of justice so requires."Fed.R.Crim.P. 33(a) (emphasis added)."Although the standard of review for a motion for a new trial is broader than that for acquittal, motions for new trials are disfavored and are only granted with great caution and at the discretion of the trial court." *United States v. Martinez*, 69 Fed. App'x 513, 516 (3d Cir.2003) (non-precedential) (*citing United States v. Allen*, 554 F.2d 398, 403 (10th Cir.1977)). Further, Rule 33(a) relief is

permissive, rather than mandatory. *Id.*

The Court may grant a Rule 33 motion if (1) the verdict is against the weight of the evidence or (2) if an error occurred during trial and it is reasonably possible that such error substantially influenced the jury's decision, or would require reversal on appeal. Our court of appeals has described a district court's consideration of a Rule 33 motion for a new trial based on the "weight of the evidence" as follows:

> A district court can order a new trial on the ground that the jury's verdict is contrary to the weight of the evidence only if it "believes that 'there is a serious danger that a miscarriage of justice has occurred – that is, that an innocent person has been convicted.'" *United States v. Santos*, 20 F.3d 280, 285 (7th Cir.1994) (*quoting United States v. Morales*, 902 F.2d 604, 606 (7th Cir.1990)). Unlike an insufficiency of the evidence claim, when a district court evaluates a Rule 33 motion it does not view the evidence favorably to the Government, but instead exercises its own judgment in assessing the Government's case. *See United States v. Lacey*, 219 F.3d 779, 783-84 (8th Cir.2000); *United States v. Ashworth*, 836 F.2d 260, 266 (6th Cir.1988).

United States v. Brennan, 326 F.3d 176, 188 (3d Cir.2003) (*quoting United States v. Johnson*, 302 F.3d 139, 150 (3d Cir.2002)).

In support of his Rule 33 Motion, Mr. Newmark offers the same arguments that he offered in support of his Rule 29 motions, which the Court discussed in great detail above. Because the Court is unaware of any additional evidence that the Government would offer on Counts Three and Five and will enter a

judgment of acquittal for Mr. Newmark as to Counts Three and Five pursuant to Rule 29, the Court need only consider his Rule 33 Motion as it would apply to Count One. However, for the same reasons provided above, the Court finds that the jury's verdict with respect to Count One was not contrary to the weight of the evidence. Accordingly, Mr. Newmark's Rule 33 Motion is denied on this basis.

Mr. Newmark also argues that the Government's failure to disclose certain evidence or information to the defense warrants the Court vacating the judgment in this case. Specifically, Mr. Newmark points to (1) the Government's failure to disclose that Mr. Zeyer had no memory of the telephone call with Mr. Newmark, which information Mr. Newmark claims Mr. Zeyer revealed on cross-examination during the course of the trial, and (2) the Government's failure to timely disclose that Thomas Walker suffered from dementia.

*33 Under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), in a criminal case the prosecution is required to produce any information that is or may be exculpatory to the defense. In addition, under *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), the prosecution must produce any information it possesses that impeaches or may lead to the impeachment of a government witness. *Brady*" 'is not a discovery rule, but a rule of fairness and minimum prosecutorial obligation.' " *United States v. Starusko*, 729 F.2d 256, 262 (3d Cir.1984) (*quoting United States v. Beasley*, 576 F.2d 626, 630 (5th Cir.1978)). "There can be no violation of *Brady* unless the government's nondisclosure infringes the defendant's fair trial

right." *Id.* (*citing United States v. Higgs*, 713 F.2d 39, 42-43 (3d Cir.1983). To constitute a *Brady* violation, the nondisclosure "must adversely affect the court's ability to reach a just conclusion, to the prejudice of the defendant." *Id.* (*citing United States v. Campagnuolo*, 592 F.2d 852, 861-62 (5th Cir.1979). " 'No denial of due process occurs if *Brady* material is disclosed in time for its effective use at trial.' " *Id.* (*quoting Higgs*, 713 F.2d at 44). Moreover, "the government is not obliged under *Brady* to furnish a defendant with information which he already has or, with any reasonable diligence, he can obtain himself." *Id.* (*citing Campagnuolo*, 592 F.2d at 861).

With respect to Mr. Zeyer's testimony, there is no indication that the Government deliberately withheld from the defense the fact that Mr. Zeyer did not specifically recall his telephone conversation with Mr. Newmark. To the contrary, it appears that this information arose for the first time only at trial and during cross-examination. Defense counsel had the opportunity to cross-examine him with respect to his memory of the telephone call with Mr. Newmark (or lack thereof), and did so. Thus, there is no *Brady* violation.

With respect to Mr. Newmark's argument that the Government's failure to timely disclose that Thomas Walker suffered from dementia warrants a new trial, he asserts that the Government did not disclose a psychological report on Thomas Walker prepared by Dr. Frederick W. Schaerf until Saturday, October 20, 2007, after the Government had rested its case-in-chief. Dr. Schaerf's report contained his observation that Thomas Walker suffered from symptoms of dementia. In addition, Mr. Newmark argues that the

report contained exculpatory statements by William Giles, who is a friend of the Walkers and serves as Thomas Walker's caretaker.

Mr. Newmark declined to file a motion for a mistrial when he was informed of Dr. Schaerf's report, and declined to move for a continuance to prepare for an examination of any witness who could speak to the contents of the report. Instead, counsel stipulated to read portions of the report into evidence. In addition, the conclusion of Dr. Schaerf's report - that Mr. Walker was competent to testify - was already known to, and conceded by, defense counsel.[40] Mr. Newmark's counsel had the opportunity to examine

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[40] The defense had been aware of a potential issue as to whether Thomas Walker suffered from dementia at least since March 2007, when counsel for the Government forwarded an August 22, 2003 report by Dr. John Meyers, the Walkers' family physician. In that report, Dr. Meyers opined that Mr. Walker exhibited early signs of dementia of the "Alzheimer's type." Defense counsel did not take any action on this information until September 18, 2007, one week before trial initially was scheduled to begin on September 25. At that time, during a pretrial conference, defense counsel raised the issue of Mr. Walker's possible dementia and began to question whether Mr. Walker was competent to testify. Thereafter, the Defendants filed a Joint Defense Motion for Mental Evaluation, or in the Alternative, for a Hearing on Mr. Walker's Competency. The Court permitted the parties to conduct a mental examination of Mr. Walker, the defense and the Government each retained an expert to examine Mr. Walker, and Mr. Walker submitted to both evaluations.

Both experts determined that Mr. Walker was competent to testify, and through informal communications with the Court, counsel for the Defendants agreed to withdraw their motion challenging Mr. Walker's competency. Moreover, on October 15, 2007, counsel for Mr. Newmark stated on the record that the issue of Mr. Walker's competency as a witness was withdrawn. (Oct. 15, 2007 Trial Tr. 3:1-10.)

Mr. Walker and Mr. Giles *after* the pertinent information was disclosed, but declined to do so.

*34 Moreover, Mr. Newmark has not explained how it is that not receiving Dr. Schaerf's report prior to trial prejudiced his defense. The parties agreed that Mr. Walker was competent to testify, and the defense knew that Mr. Walker would be called to testify on behalf of the Government. Any issues with respect to Mr. Walker's mental capacity or acuity, therefore, naturally would concern his credibility as a witness rather than his competency to testify. The jury heard evidence that Mr. Walker suffered from dementia, and it was free to consider that factor when reflecting upon his testimony. Because Mr. Newmark had the relevant information in time to use at trail, and because Mr. Newmark has offered no reasonable argument that the Government's failure to timely disclose this information infringed upon his "fair trial right," there is no *Brady* violation.

For the reasons stated above, Mr. Newmark's Rule 33 Motion is denied.

III. MR. NEWMARK'S RULE 34 MOTION TO ARREST JUDGMENT

Rule 34(a) provides that "[u]pon the defendant's motion or on its own, the court must arrest judgment if: (1) the indictment or information does not charge an offense; or (2) the court does not have jurisdiction of the charged offense."Fed.R.Crim.P. 34(a). In deciding a Rule 34 motion, "[a] court may not look beyond the face of the 'record' which consists of 'no more than the indictment, the plea, the verdict ...

when the plea is "not guilty" ... and the sentence ....' " *United States v. Buckeridge,* Crim. No.2007-17, 2007 U.S. Dist. LEXIS 79613, at *5, 2007 WL 3171941 (D.V.I. Oct. 22, 2007) (*quoting United States v. Stolon,* 555 F.Supp. 238, 239 (E.D.N.Y.1983) (*quoting United States v. Bradford,* 194 F.2d 197, 201 (2d Cir.1952))); *see also United States v. Diaz,* Crim. No. 92-78, 1993 U.S. Dist. LEXIS 3569, at *5, 1993 WL 85764 (E.D.Pa. Mar. 25, 1993) ("A Rule 34 motion must be based solely on a defect apparent on the face of the indictment itself, and not on the sufficiency of the evidence adduced at trial.") (*citing United States v. Sisson,* 399 U.S. 267, 280-81, 90 S.Ct. 2117, 26 L.Ed.2d 608 (1970))).

Mr. Newmark incorporates his Rule 29 arguments in support of his Rule 34 Motion, in effect recasting his Rule 29 motion and Rule 33 motion as a Rule 34 motion as well. However, because the Indictment in this case charges appropriate offenses and the Court had proper jurisdiction of each charged offense, this Motion is denied.

IV. MR. WIGHT'S RULE 29 MOTION FOR JUDGMENT OF ACQUITTAL

Mr. Wight also moved for judgment of acquittal under Rule 29(a) with respect to Count Four of the Indictment. Count Four charged Mr. Wight with the December 17, 2003 mailing, through his attorney, of answers to interrogatories in the civil suit brought by the Walkers against Messrs. Wight and Newmark, among others. The evidence produced by the Government in support of these charges, and the theories advanced by the Government as to why these charges should remain, largely are identical to

the evidence and arguments concerning Count Three, which are discussed in detail above. Thus, for the same reasons Mr. Newmark's Rule 29(a) Motion will be granted as to Count Three, Mr. Wight's Rule 29(a) Motion will be granted as to Count Four. The Government did not present sufficient evidence that Mr. Wight's December 17, 2003 mailing of interrogatory answers was "in furtherance" of the scheme to defraud the Walkers. Because the facts and law discussed above in reference to Mr. Newmark's motion apply equally to Counts Three and Counts Four of the Indictment, a judgment of acquittal will be entered for Mr. Wight on Count Four.

CONCLUSION

*35 For the reasons provided above, Mr. Newmark's Rule 29 Motion for Acquittal will be granted in part, and a judgment of acquittal will be entered in his favor with respect to Counts Two, Three and Five of the Indictment. Mr. Newmark's Rule 29 Motion will be denied in all other respects, and his Rule 33 and Rule 34 Motions also will be denied.

Mr. Wight's Rule 29 Motion for Acquittal will be granted, and a judgment of acquittal will be entered in his favor with respect to Counts Two and Four of the Indictment.

ORDER

AND NOW, this 4th day of April, 2008, after consideration of the motions identified below filed by Brian J. Newmark and John N. Wight, the Government's responses thereto, and the various

reply briefs and letter memoranda the parties submitted in support of their respective positions, and after oral argument on these motions, for the reasons provided in the Memorandum accompanying this Order, **IT IS ORDERED** that:

1. Mr. Newmark's Motion for Acquittal Under Rule 29 at the Close of the Government's Case (Docket No. 96), as supplemented by his Supplemental Motion for Acquittal Under Rule 29 at the Close of the Government's Case (Docket No. 110) is **GRANTED IN PART** and **DENIED IN PART** as follows:
   A. With respect to **COUNTS THREE** and **FIVE** of the Indictment, the Motion (Docket Nos. 96, 110) is **GRANTED,** and the Clerk of Court shall enter a **JUDGMENT OF ACQUITTAL** in favor of Brian J. Newmark as to those Counts.
   B. The Motion (Docket Nos. 96, 110) is **DENIED** in all other respects.

2. Mr. Newmark's Motion for Acquittal under Rule 29(c), New Trial under Rule 33(a) and Arrest of Judgment under Rule 34(a) (Docket No. 111), as supplemented by his Motion for Acquittal under Rule 29(c), New Trial under Rule 33(a) and Arrest of Judgment under Rule 34(a) with Annotations to the Trial Transcript (Docket No. 131) is **MOOT IN PART** and **DENIED IN PART** as follows:
   A. With respect to **COUNTS THREE** and **FIVE** of the Indictment, the Motion (Docket Nos. 111, 131) is **MOOT.**
   B. The Motion (Docket Nos. 111, 131) is **DENIED** in all other respects.

3. Mr. Wight's Motion for Acquittal (Docket No. 109)

is **GRANTED**, and the Clerk of Court shall enter a **JUDGMENT OF ACQUITTAL** in favor of John W. Wight as to **COUNT FOUR** of the Indictment.

IT IS FURTHER ORDERED that for the reasons discussed on the record in open court on October 17, 2007 and October 19, 2007, the Clerk of Court shall enter a **JUDGMENT OF ACQUITTAL** in favor of Brian J. Newmark and John W. Wight as to **COUNT TWO** of the Indictment.

Appx. C

Only the Westlaw citation is currently available.

2008 WL 2165093

United States District Court, E.D. Pennsylvania.

UNITED STATES of America

v.

Brian J. **NEWMARK**, Defendant.

Criminal No. 06-447-1.

May 22, 2008.

Ronald H. Levine, Post & Shell, P.C., Philadelphia PA, for Defendant.

Richard A. Lloret, Assistant U.S. Attorney, Phila PA, for United States of America.

MEMORANDUM

PRATTER, District Judge.

PROCEDURAL BACKGROUND

*1 On October 24, 2007, a federal jury convicted Brian J. Newmark of one count of wire fraud (Count One of the Indictment), one count of mail fraud (Count Three), and one count of making a false statement under oath (Count Five). The jury acquitted Mr. Newmark on one count of mail fraud (Count Four), and the Court dismissed one count of wire fraud (Count Two) following the conclusion of the Government's case.[1] The underpinnings of the

[1] Mr. Newmark was tried along with co-defendant John Wight. The jury acquitted Mr. Wight on Counts One and Three, but was not able to reach a decision with respect to Mr. Wight on Count Four. On April 4, 2008, the Court granted Mr. Wight's

charges involved investment and estate planning products that Mr. Newmark and people he employed sold to two elderly brothers, Arthur and Thomas Walker.

On April 4, 2008, the Court granted in part Mr. Newmark's motion under Rule 29 of the Federal Rules of Criminal Procedure, and entered a judgment of acquittal in his favor as to Counts Three and Five. *United States v. Newmark,* Crim. No. 07-447, 2008 U.S. Dist. LEXIS 27460, 2008 WL 927961 (E.D.Pa. Apr. 4, 2008). The Court denied Mr. Newmark's Rule 29 motion as to Count One, and denied his motions under Rules 33 and 34. Thereafter, Mr. Newmark timely moved the Court to reconsider its decision with respect to Count One, and requested the Court to enter a judgment of acquittal or grant him a new trial as to that Count. In his motion, Mr. Newmark argues that (1) the Third Circuit Court of Appeals' holdings in *United States v. Pearlstein,* 576 F.2d 531 (3d Cir.1978), and *United States v. Dobson,* 419 F.3d 231 (3d Cir.2005), require the Court to vacate his conviction on Count One pursuant to Rule 29(a) or grant a new trial under Rule 33; and (2) he is entitled to a new trial under Rule 33 as a matter of fundamental fairness. The Government opposes Mr. Newmark's motion. For the reasons discussed below, Mr. Newmark's Motion for Reconsideration will be denied.

LEGAL STANDARD

While the Federal Rules of Criminal Procedure do

Rule 29 motion, and entered a judgment of acquittal as to Mr. Wight on Count Four.

not contain a rule specifically discussing motions for reconsideration, our Local Rule of Criminal Procedure 1.2 adopts for use in criminal cases Local Rule of Civil Procedure 7.1(g), which states that "motions for reconsideration or reargument shall be served and filed within ten (10) days after the entry of the judgment, order, or decree concerned." Absent guidance under the criminal rules, the Court looks to the jurisprudence under Federal Rule of Civil Procedure 59(e) for guidance in considering Mr. Newmark's motion. *United States v. Lee*, 82 F.Supp.2d 389, 390-91 n. 4 (E.D.Pa.2000) (*citing Rankin v. Heckler*, 761 F.2d 936, 942 (3d Cir.1985) ("Regardless how it is styled, a motion filed within ten days of entry of judgment questioning the correctness of the judgment may be treated as a motion ... under Rule 59(e).")). The purpose of a motion for reconsideration under Rule 59(e) of the Federal Rules of Civil Procedure is to "correct manifest errors of law or fact or to present newly discovered evidence." *Harsco Corp. v. Zlotnicki*, 779 F.2d 906, 909 (3d Cir.1985). A motion for reconsideration is not to be used as a means to reargue a case or to ask a court to rethink a decision it has made. *Armstrong v. Reisman*, No. 99-4188, 2000 U.S. Dist. LEXIS 3119, at *9, 2000 WL 288243 (E.D.Pa. March 7, 2000). It is not a substitute for an appeal. *See Waye v. First Citizen's Nat'l Bank*, 846 F.Supp. 310, 314 (M.D.Pa.1994). A conventional motion for reconsideration must rely on at least one of three grounds: 1) intervening change in controlling law, 2) availability of new evidence not previously available, or 3) need to correct a clear error of law or prevent manifest injustice. *N. River Ins. Co. v. CIGNA Reinsurance Co.*, 52 F.3d 1194, 1218 (3d Cir.1995); *Waye*, 846 F.Supp. at 313-14.

DISCUSSION

*2 Mr. Newmark's motion does not cite the standard under which the Court reviews a motion for reconsideration, and, accordingly, does not cite which, if any, of the three bases for seeking reconsideration cited above justify his current request. However, Mr. Newmark neither cites any change in controlling law nor refers the Court to any new evidence. Arguably, however, he has presented at least some aspects of his motion in order "to correct a clear error of law or prevent manifest injustice," at least as he perceives the status of the case. The Court will consider whether the issues raised in Mr. Newmark's motion pass muster on that basis.

I. SUFFICIENCY OF EVIDENCE AS TO COUNT ONE UNDER RULE 29 OR RULE 33

The Indictment charged Mr. Newmark and Mr. Wight with devising and/or participating in a scheme to defraud the Walker brothers by misrepresenting themselves as lawyers in order to convince the Walkers to purchase high-priced annuity products. Neither Mr. Newmark nor Mr. Wight is, or ever was, a lawyer. Count One of the Indictment charged Mr. Newmark with violations of the federal wire fraud statute, 18 U.S.C. § 1343. To sustain a conviction for wire fraud, the Government must establish (1) the existence of a scheme to defraud; (2) the use of interstate wire facilities, "for the purpose of executing" the fraudulent scheme; and (3) culpable participation by the defendant, that is, participation by the defendant with specific intent to defraud.

The Indictment described the charged scheme as follows:

> Defendant **BRIAN J. NEWMARK** designed and implemented, and defendant **JOHN J. WIGHT** implemented, various sales techniques and devices, including oral presentations, documents, letters and business cards, for the purpose of fostering the false impression that defendants were attorneys, or in the employ of an attorney, in order to gain the trust of [the Walkers] and to sell them tax deferred annuities.

(Indictment at 2 ¶ 8.B.)

Mr. Newmark argues that his wire fraud conviction must be vacated because the evidence produced by the Government at trial was insufficient to show that Mr. Newmark participated in a scheme to defraud the Walker brothers. He claims that the Government relied on two "buckets" of evidence, namely, (1) alleged misrepresentations by John Wight concerning Mr. Wight's lawyer status, and the resulting misimpression held by Thomas Walker; and (2) Mr. Newmark's communications with the Morgan Stanley brokerage firm concerning Mr. Newmark's supposed lawyer status. Mr. Newmark argues that the Government did not produce any evidence connecting Mr. Wight's conduct to Mr. Newmark's conduct. Furthermore, Mr. Newmark argues that under *Pearlstein*[2] and *Dobson*,[3] merely

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[2] In *Pearlstein*, the Third Circuit Court of Appeals stated that to sustain a conviction for mail fraud, "the evidence must indicate that the defendants had knowledge of the fraudulent nature of the [enterprise] and wilfully participated in the scheme with the intent that its illicit objectives be achieved." 576 F.2d at 541. The "scheme" in that case involved the sale of

having a business relationship with Mr. Wight is not enough to ground a conviction for wire fraud, and even if he lied to Morgan Stanley, he cannot be convicted for wire fraud absent other evidence linking him to the overarching charged scheme.

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distributorships for a direct-mail-marketing pen company. Although the *Pearlstein* court found that the scheme at issue was fraudulently conceived and operated, the court reversed the convictions of certain low-level salesmen, finding that they were not part of that overarching scheme. The court found that "although the defendants might have made fraudulent misrepresentations during the course of their individual sales presentations, the jury could not reasonably infer that the salesmen knew of the fraudulent purpose of the overall ... scheme." *Id.* at 545. In sum, the court found that evidence showed that the principal architects of the scheme originated and initiated the scheme and developed its fraudulent aspects, but that there was no evidence that any of the low-level defendant-salesmen ever joined in the principals' scheme. *Id.* at 537-38.

[3] In *Dobson*, the court of appeals reversed a defendant's mail fraud convictions because the district court's jury instructions were erroneous. 419 F.3d at 241. The court of appeals analogized *Pearlstein*, noting that Dobson also involved "two layers of potential fraud or misrepresentation that do not necessarily interconnect. (1) Dobson's dubious sales presentations, and (2) the fraudulent ... scheme charged in the Indictment." *Id.* at 238. The court stated that "*Pearlstein* is clear in teaching that proof of Dobson's participation in the latter is necessary to the prosecution's case and that proof of the former is only relevant to the extent it may constitute circumstantial evidence of the latter." *Id.* (*citing Pearlstein*, 576 F.2d at 544). The court of appeals reversed because the district court's jury instruction failed to make the necessary legal distinction between the defendant's fraudulent misrepresentations and the scheme itself, "and thus entirely omitted the prosecution's obligation to show that Dobson knowingly devised or participated in the broader ... scheme as charged in the Indictment." *Id.*

*3 Mr. Newmark's motion on this issue will be denied. First, Mr. Newmark's motion asks the Court to "rethink a decision it has made" previously, which is an impermissible purpose of a motion for reconsideration. *Armstrong,* 2000 U.S. Dist. LEXIS 3119, at *9, 2000 WL 288243. Indeed, Mr. Newmark raised this identical *Pearlstein/Dobson* argument in his previous Rule 29 motion (and supplemental briefs), which the Court denied on April 4, 2008. The Court denies Mr. Newmark's motion as to this issue for this reason alone.

Secondly, Mr. Newmark's arguments invoking *Pearlstein* and *Dobson* are substantively unavailing. Unlike the defendants in *Pearlstein* and *Dobson,* who were low-level functionaries dispensed by the architects of the alleged schemes to do their dirty work, Mr. Newmark cannot argue that he acted as an unwitting pawn in scheme devised by other, more culpable or more senior offenders. In this case, Mr. Newmark was the "mastermind" of the scheme, so to speak. He owned the (non-law firm) entities that employed Mr. Wight and others. He devised the marketing strategy that targeted elderly individuals, such as the Walkers, with a view to convince those individuals to purchase high-priced annuity products from Mr. Newmark's companies. Mr. Newmark earned a significant commission on each sale his employees consummated. Morever [sic], the Indictment charged Mr. Newmark with both devising and participating in the overarching scheme. In the Court's April 4, 2008 Memorandum, the Court extensively reviewed the evidence linking Mr. Newmark to the scheme, both as an orchestrator of the scheme and as a participant. *See Newmark,* 2008 U.S. Dist. LEXIS 27460, at *27-32, 2008 WL

927961 (discussing evidence that Mr. Newmark "devised" the scheme); *id.* at * 32-35 (discussing evidence that Mr. Newmark "participated" in the scheme). While the Court noted that the evidence presented by the Government arguably could be susceptible to competing inferences, the Court found that it was sufficient to ground a conviction for wire fraud. "The evidence need not unequivocally point to the defendant's guilt," *United States v. Pungitore*, 910 F.2d 1084, 1129 (3d Cir.Pa.1990), and it "'does not need to be inconsistent with every conclusion save that of guilt if it does establish a case from which the jury can find the defendant guilty beyond a reasonable doubt.'" *Gov't of the Virgin Islands v. Williams*, 739 F.2d 936, 940 (3d Cir.1984) (*quoting United States v. Allard*, 240 F.2d 840, 841 (3d Cir.1957)).

For the same reasons provided in the Court's April 4, 2008 Memorandum, Mr. Newmark's motion for reconsideration as to Count One - under either Rule 29 or Rule 33 - will be denied. In this case, there is a "logical and convincing" nexus between the Government's evidence and the guilty verdict as to Count One, *Williams*, 739 F.2d at 940 (*citing United States v. Bycer*, 593 F.2d 549, 550 (3d Cir.1979)), and the court of appeals' holdings in *Pearlstein* and *Dobson* do not cause the Court to reconsider its April 4, 2008 decision on the basis now argued by Mr. Newmark.

II. FUNDAMENTAL FAIRNESS ISSUES CONSIDERED UNDER RULE 33

*4 Secondly, Mr. Newmark argues that he is entitled to a new trial on Count One under Rule 33, for

reasons that emerge from the Court's April 4, 2008 ruling. He argues that, as the Court ruled, the Government had insufficient evidence on Counts Two through Five to go to a jury. However, argues Mr. Newmark, because the Court reserved its decision on Counts Three through Five until after the jury reached a verdict, the Government was permitted to proceed to make "extremely prejudicial" closing arguments, based on evidence and charges that, had the Court entered a judgment for acquittal at the close of the evidence, would not have been part of the case. Moreover, Mr. Newmark argues that his Fifth Amendment right to testify was unfairly constrained by the fact that Counts Two through Five were sent to a jury.

A. "Prejudicial Spillover"

Count Five of the Indictment charged Mr. Newmark with making a false declaration under oath in violation of 18 U.S.C. § 1623(a). This charge stemmed from the Government's allegation that Mr. Newmark told Christopher Zeyer, an employee of Morgan Stanley, in a telephone conversation initiated by Mr. Newmark, that he (Mr. Newmark) was an attorney for the Walkers. In a deposition in a civil action brought by the Walkers against Mr. Newmark arising out of Mr. Newmark's sale of annuities to the Walkers, Mr. Newmark testified under oath that he had never represented himself as an attorney to the Walkers. This allegedly false deposition statement was the basis for the Government's Count Five-false declaration charge. At trial, according to Mr. Newmark, the Government's attorney made numerous statements during closing and rebuttal arguments "absolutely

hammer[ing] on the theme of Mr. Newmark 'lying' under oath in his civil deposition about the Zeyer call." (Def.Mot. 5.) The jury then found Mr. Newmark guilty as to Count Five.

The Court granted Mr. Newmark's Rule 29 motion as to Count Five, finding that the Government produced insufficient evidence that Mr. Newmark affirmatively misrepresented himself as a lawyer for the Walkers in his telephone conversation with Mr. Zeyer in order to ground a conviction under 18 U.S.C. § 1623(a). The Court also found that the Government failed to prove that Mr. Newmark's allegedly false statement was "material" to the underlying civil litigation initiated by the Walkers. Mr. Newmark now argues that the Government would not have been able to make these statements had Count Five not been part of the case when the Government presented its closing arguments. He argues that the Government's statements to the jury regarding Mr. Newmark's alleged "lies" caused "prejudicial spillover."

In determining whether "prejudicial spillover" occurs, courts consider "two inquiries: (1) whether the jury heard evidence that would have been inadmissible at a trial limited to the remaining valid count (i.e., "spillover" evidence); and (2) if there was any spillover evidence, whether it was prejudicial (i.e., whether it affected adversely the verdict on the remaining count)." *United States v. Cross*, 308 F.3d 308, 317 (3d Cir.2002). The Third Circuit Court of Appeals stated:

> *5 it is crucial to understand when prejudicial spillover may occur. When a defendant is convicted on two counts involving different

> offenses at a single trial and an appellate court reverses his conviction on one of them, prejudicial spillover can occur only if the evidence introduced to support the reversed count would have been inadmissible at a trial on the remaining count.

Id. However, it is entirely sensible to conclude that a defendant is not "prejudiced" where the same evidence he complains about would have been admissible to prove both counts. *See id.*("If the evidence to prove the overturned count would have been admissible to prove the remaining valid count, the defendant was not prejudiced, and there is no need to consider whether the evidence influenced the outcome."); *United States v. Eufrasio,* 935 F.2d 553, 571 (3d Cir.1991) (stating that a defendant was not prejudiced by the denial of his motion to sever RICO from non-RICO counts where "the same evidence" was admissible to prove both sets of counts).

In his motion for reconsideration, Mr. Newmark does not refer the Court to any particular *evidence* that the Government used to prove Count Five, which he could rightfully argue would not have been admissible to prove Count One. Instead, Mr. Newmark emphasizes the Government's counsel's supposedly prejudicial comments during closing arguments referring to Mr. Newmark's "lies." However, evidence (and counsel's comments) regarding Mr. Newmark's alleged "lies" would have been admissible to prove Count One, had the Government tried Mr. Newmark on Count One alone, because the thrust of the Government's Count One-case involved Mr. Newmark's (and Mr. Wight's) allegedly false misrepresentations about being a lawyer. The "scheme" as charged in the Indictment, as described above, charged Mr. Newmark and Mr.

Wight with committing certain acts "for the purpose of fostering the false impression that defendants were attorneys." Even though the Court found that Mr. Zeyer's testimony was insufficient to ground the Count Five - false declaration charge, evidence of Mr. Newmark's alleged misrepresentation to Mr. Zeyer, supplemented by his facsimile communications to Mr. Zeyer, would have been admissible as proof of Mr. Newmark's participation in the scheme to defraud the Walkers, as charged in Count One. Therefore, the Court rejects Mr. Newmark's arguments as to "prejudicial spillover."

B. Mr. Newmark's Fifth Amendment Right to Testify

Finally, Mr. Newmark argues that his Fifth Amendment right and ability to testify in his defense was effectively denied. He argues that, given the holes in the Government's evidence as to Count Five, for him to testify while that Count was still viable would have risked resuscitating the Government's case because the Government could have cross-examined Mr. Newmark as to his conversations with Mr. Zeyer, his understanding of the deposition questions and answers that formed the basis for Count Five, his knowledge of the civil law suit brought by the Walkers and the importance or relevance (i.e, the "materiality") of his deposition statements to that litigation. However, Mr. Newmark argues that if Count One had stood alone, he could have testified as to his research and due diligence regarding the Walkers' viable estate planning options, his commissions, certain details about the Morgan Stanley communications, and his contacts with, advice to, and positive relationship

with, the Walkers in the years following the annuity transactions at issue. Mr. Newmark cites no case law in support of his position here.

*6 As an initial matter, the Court notes that Mr. Newmark did not file a pretrial motion to sever the various counts in the Indictment. Had he done so, and expressed his concerns about his inability to testify fully at that time, it would lend some validity to Mr. Newmark's arguments now. However, as noted above, the Government's evidence as to Count Five (and Count Three), namely, evidence surrounding Mr. Newmark's conversation and facsimile communications with Mr. Zeyer at Morgan Stanley, largely would have been admissible to prove Mr. Newmark's participation in the fraudulent scheme charged in Count One of the Indictment. Had Mr. Newmark taken the stand in his own defense, he would have opened himself up to cross-examination about his conversations with Mr. Zeyer, his motive in calling Mr. Zeyer, his motive in using letterhead from the Bohmueller Law Offices, instead of letterhead from one of the numerous companies that he owned and operated, to communicate with Mr. Zeyer, among other issues that could have been problematic for Mr. Newmark. All of this evidence related to Mr. Newmark's participation in the "scheme" charged in Count One as well as the false declaration charged in Count Five, as to which Mr. Newmark subsequently was acquitted. A defendant's decision whether to testify in a criminal proceeding typically will be a carefully-considered, often strategic choice wrought with potential advantages and disadvantages. Mr. Newmark's decision, with the aid of counsel, not to testify in this case certainly entailed numerous potential complications. However,

Mr. Newmark has not convinced the Court that his decision to testify would have been any different had Count One stood alone as he contemplated possibly taking the witness stand. Mr. Newmark's Rule 33 motion will be denied.

An Order consistent with this Memorandum follows.

ORDER

AND NOW, this 21st day of May, 2008, after consideration of Brian J. Newmark's Motion for Reconsideration (Docket No. 142), and the Government's responses thereto (Docket Nos. 143-144), for the reasons provided in the Memorandum accompanying this Order, **IT IS ORDERED** that Mr. Newmark's Motion for Reconsideration (Docket No. 142) is **DENIED.**

Appx. D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 08-3356

UNITED STATES OF AMERICA
v.
BRIAN J. NEWMARK,
Appellant

SUR PETITION FOR REHEARING

Present: Before: SLOVITER, ROTH, and TASHIMA,* Circuit Judges

The petition for rehearing filed by Appellant Brian J. Newmark in the above-entitled case having been submitted to the judges who participated in the decision of this court, and no judge who concurred in the decision having asked for rehearing, the petition for rehearing is denied.

By the Court,
/s/ Dolores K. Sloviter
Circuit Judge

Dated: April 20, 2010
par/cc: R.A.L., Esq.
L.M., Esq.
P.G., Esq.

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* Honorable A. Wallace Tashima, Senior Judge of the United States Court of Appeals for the Ninth Circuit, sitting by designation.